Supreme Court
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In The

Supreme Court of the United States

October Term, 1996

TRACTOR SUPPLY COMPANY, INC.,

Petitioner,

v.

VINCENT L. PRYNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a voluntary agreement to arbitrate federal statutory employment discrimination claims is enforceable under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), notwithstanding that it is part of a collective bargaining agreement.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the United States Court of Appeals for the Seventh Circuit, with the exception of amici curiae, appear in the caption to this Petition. Petitioner, Tractor Supply Company, Inc., has no parent companies or nonwholly owned subsidiaries to be listed pursuant to Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Tractor Supply Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 20, 1997 in this case.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is officially reported at 109 F.3d 354 (7th Cir. 1997) and appears in the Appendix of this petition at pages App. 1-27.[1] The decision of the United States District Court for the Southern District of Indiana is officially reported at 927 F. Supp. 1140 (S.D. Ind. 1996) and appears in the Appendix of this petition at pages App. 28-44.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] Reference to the Appendix to this petition will be as follows: "App. ___."

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2.

Section 3 of the FAA, 9 U.S.C. § 3.

Section 16 of the FAA, 9 U.S.C. § 16.

Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081 (1991).

Section 12212 of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12212.

Pursuant to Supreme Court Rule 14(f) the text of these statutes are set forth, *infra*, at App. 45-47.

STATEMENT OF THE CASE

A. The Facts And The Jurisdiction Of The District Court.

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1343 (jurisdiction over civil rights actions). In the District Court, the Respondent, Vincent L. Pryner ("Pryner") filed several complaints against the Petitioner, Tractor Supply Company, Inc. ("TSC"), alleging that TSC discriminated against him in the terms and conditions of his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title I of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). (App. 31.)

The terms and conditions of Pryner's employment with TSC were governed by a collective bargaining agreement ("CBA") between TSC and Pryner's exclusive bargaining representative, Chauffers, Teamsters, Warehousemen and Helpers Local No. 135 (the "Union").

The CBA includes, *inter alia*, a " 'Grievance and Arbitration Procedure' for the resolution of any disputes 'involving interpretation or application of the provisions of this Agreement' " (App. 30) (citation to record omitted). The grievance procedure provides for a three-step grievance adjustment process followed by arbitration which is " 'final and binding on both parties.' " (*Id.*)

The CBA also contains the following provisions:

> *Section 2 – No Discrimination*
>
> The Company agrees that it will not discriminate against any associate for employment for or on account of his affiliation or activities with the Union. The Company and Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of an individual's race, color, religion, age, sex, or national origin. Nor will the Company limit, segregate or classify associates in any way to deprive any individual associate of employment opportunities because of race, color, religion, age, sex, veteran or national origin.
>
> *Section 3 – The Americans With Disabilities Act (ADA)*
>
> Due to the Americans With Disabilities Act or the regulations promulgated thereunder, the Company may be required to make a reasonable accommodation to the disability of an applicant

> or incumbent associate that may be in conflict with provisions of this Agreement. In such event, the Company shall be privileged to make such accommodation notwithstanding the requirements of this Agreement. The Company shall notify the Union thereafter as soon as is practicable of such situation on a confidential basis.

(App. 30-31.)

B. Proceedings Below.

On or about April 4, 1994, TSC moved to dismiss Pryner's claims for lack of subject matter jurisdiction or, in the alternative, to stay, pursuant to section 3 of the FAA, 9 U.S.C. § 3, the District Court's proceedings pending arbitration. TSC's motion was based upon the provisions of the collective bargaining agreement ("CBA") between TSC and the union representing Pryner. (App. 31.)

TSC argued that these provisions of the CBA required Pryner to arbitrate his statutory employment discrimination claims. To support its argument, TSC relied upon the then recent decision of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996) (holding that statutory employment discrimination claims were subject to arbitration pursuant to the mandatory arbitration provisions of the CBA governing the terms and conditions of the plaintiff's employment). (App. 33-34.)

On or about May 28, 1996, the District Court denied TSC's motion for summary judgment or, in the alternative, to stay its proceedings pending arbitration of Pryner's claims. (App. 28.) In so deciding, the District Court addressed *Austin* as follows:

> Clearly, if the decision of the Fourth Circuit [in *Austin*] is a correct pronouncement of federal law, then the instant case must be dismissed, because Pryner's sole remedy for the discrimination claimed would be pursuant to the arbitration clause in the CBA. However, it is the court's assessment that *Austin* is not an accurate interpretation of federal law as it presently stands and that the reasoning of the majority in that case would not be adopted by the Seventh Circuit if faced with a similar case.

(App. 38) (material in brackets added).

The District Court concluded that *Austin* incorrectly applied to a CBA this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that statutory employment discrimination claims are subject to agreements to arbitrate. The District Court reasoned that *Gilmer's* holding cannot be applied to a CBA given this Court's holding in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), that arbitration of an employee's discharge under the "just cause" provisions of a CBA did not preclude a subsequent claim in court that the discharge violated Title VII. (App. 39.)

Pursuant to section 16 of the FAA, 9 U.S.C. § 16, TSC interlocutorily appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). (App. 6.) As previously noted,

on or about March 20, 1997, the Seventh Circuit affirmed the decision of the District Court. (App. 1-2.) In so doing, the Seventh Circuit concluded that neither *Gilmer* nor *Gardner-Denver* were controlling precedent and held that:

> the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.

(App. 23) (emphasis in original).

By order dated May 14, 1997, the Honorable John Paul Stevens, Associate Justice of this Court and Circuit Justice for the Seventh Circuit, granted a stay of proceedings in the District Court for the Southern District of Indiana pending the timely filing of this petition.

REASONS FOR GRANTING THE WRIT

As the Seventh Circuit acknowledged, its decision in this case directly conflicts with a decision of the Fourth Circuit, but is in agreement with a decision of the Eighth Circuit. (App. 23-24.) As the Seventh Circuit also acknowledged, this split in the Circuits can only be resolved by this Court because it involves the proper interpretation of two previous decisions of this Court. (App. 27.)

At the District Court level, conflicting decisions regarding whether statutory employment discrimination claims must be arbitrated pursuant to a CBA are proliferating rapidly. This kind of litigation is inherently unproductive. As Justice Scalia has observed, "[n]othing

is more wasteful than litigation about where to litigate. . . . " *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting); *see also Christensen v. Colt Industries Operating Corp.*, 486 U.S. 800, 818-19 (1988). Justice Scalia's comments apply with even greater force to the issue raised by this petition because, absent guidance from this Court, the lower courts' efforts to resolve this issue will be futile because it involves the proper application of *Gilmer* to CBAs.

Moreover, the Seventh Circuit's decision is contrary to the many recent decisions of this Court favoring the arbitration of statutory claims. Therefore, this case provides this Court with the opportunity to clarify its prior decisions favoring the arbitration of statutory claims while removing a threat to the orderly administration of justice.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE CIRCUITS THAT THREATENS THE ORDERLY ADMINISTRATION OF JUSTICE IN VIRTUALLY ALL CASES IN WHICH UNION MEMBERS ASSERT STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS AGAINST THEIR EMPLOYERS.

In its opinion, the Seventh Circuit defined the issue in this case as follows:

> . . . can a collective bargaining agreement compel an employee to arbitrate a claim that he may have under one of the federal statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the

> Americans With Disabilities Act, that confer litigable rights on employees?

(App. 3).

The Seventh Circuit held that a CBA cannot compel arbitration of statutory employment discrimination claims. (App. 23) In so holding, the Seventh Circuit expressly recognized a split in the Circuits regarding this issue. As the Seventh Circuit observed in its opinion:

> Both sides of these appeals also are able to cite a case or two that squarely support their position – cases that really do not differ in any material particular from the present one – *but in doing so all they have done is identify a circuit split.* Compare *Austin v. Owens-Brockway Glass Container, Inc., supra,* 78 F.3d at 885, with *Varner v. National Super Markets, Inc.,* 94 F.3d 1209, 1213 (8th Cir. 1996).

(App. 23-24.) (emphasis added). The Seventh Circuit rejected the Fourth Circuit's decision in *Austin* and reached the same result as the Eighth Circuit in *Varner.*

The Seventh Circuit further recognized that this split in the Circuits can only be resolved by this Court because it involves reconciling this Court's seemingly incongruous decisions in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974) (holding that the arbitration of an employee's discharge under the "just cause" provisions of a CBA did not preclude a subsequent claim in court that the discharge violated Title VII), and *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) (holding that statutory employment discrimination claims are subject to agreements to arbitrate). As the Seventh Circuit observed in its decision in the case at bar:

> On balance our case is closer to *Alexander* [than *Gilmer*], *but is enough left of Alexander* [*after Gilmer*] *to compel a decision in favor of the plaintiffs? Only the Supreme Court can answer that question;* and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so. *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir. 1996), cert. granted, 117 S. Ct. 941 (1997). The conservative reading of *Gilmer* is that it just pruned some dicta from *Alexander* – and it certainly cannot be taken to *hold* that collective bargaining agreements can compel the arbitration of statutory rights. That issue was not before the Court or discussed by it. *The Court may have so distinguished Alexander as to deprive it of any authoritative force;* but that is the most it did and by doing so opened what till then had been a closed issue.

(App. 27) (emphasis – except for the word "hold" – and material in brackets added).

The tension between *Garnder-Denver* and *Gilmer* is highlighted by the growing acceptance of alternate dispute resolution as recognized by many decisions of this Court, including *Gilmer*, and by Congress when it enacted the Civil Rights Act of 1991 and the Americans With Disabilities Act of 1990. *See* Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081 (1991) and 42 U.S.C. § 12212. (Both statutory provisions are set forth, *infra*, at App. 47.)

The existing split in the Circuits regarding how to apply *Garder-Denver* and *Gilmer* to agreements to arbitrate statutory claims that are part of a CBA threatens the orderly administration of justice. This problem is particularly acute in the majority of federal circuits that apply

the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), to CBAs.[2]

In those Circuits that apply the FAA to CBAs, a defendant seeking to compel arbitration of a statutory employment discrimination claim pursuant to a CBA must interlocutorily appeal a denial of a motion to compel arbitration or risk waiving the issue. *See Cotton v. Sloan*, 4 F.3d 176, 180 (2nd Cir. 1993) (holding that a party which loses a motion to compel arbitration under the FAA *must* pursue an interlocutory appeal or *waive* the issue). Therefore, absent a resolution of the issue raised by this petition, the federal courts of appeals and this Court are threatened with a flood of interlocutory appeals. As discussed, *infra*, numerous cases involving this issue are pending in the district courts.

Even in the minority of Circuits that do not apply the FAA to CBAs, the failure to resolve the issue raised by this petition threatens the orderly administration of justice. Without definitive guidance from this Court, district courts in those Circuits will try cases with the threat of the case being thrown out of the courts and into arbitration on appeal.

Therefore, the impact on the administration of justice of the issue raised by this petition renders this petition especially meritorious. *See Linkletter v. Walker*, 381 U.S. 618, 620 (1965) (granting certiorari to resolve a conflict in

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[2] The split in the Circuits regarding the applicability of the FAA to CBAs is discussed in the Seventh Circuit's opinion in the case at bar and will not be repeated here for purposes of brevity. (*See* App. 6-8.)

the Circuits over "what has become a most troublesome question in the administration of justice").

The issue raised by this petition affects numerous pending cases, as is pointedly illustrated by at least eighteen recent decisions (all rendered within roughly the last year) involving this same issue.[3] Three of these recent decisions were decided by district courts in the Fourth Circuit, applying the Fourth Circuit's holding in *Austin* that statutory employment discrimination claims are subject to arbitration provisions in CBAs.[4]

Additionally, outside the Fourth Circuit, seven federal district courts and one state appellate court decided to follow Austin and held that statutory employment discrimination claims are subject to arbitration provisions in CBAs.[5] On the

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[3] TSC lodged all unpublished decisions cited in this petition with the Clerk of this Court pursuant to the Clerk's "Memorandum To Those Intending To Prepare A Petition For A Writ Of Certiorari And Pay The $300.00 Docket Fee" dated October, 1995. A copy of said lodging was served upon each party required to be served with a copy of this petition.

[4] *See Bright v. Norshipco*, 951 F. Supp. 95 (E.D. Va. 1997); *Smith v. UPS*, 947 F. Supp. 190 (D. Md. 1996); *Hampton v. Kroger Co.*, 1996 U.S. Dist. LEXIS 14407 (W.D. Va. Sept. 27, 1996).

[5] *See Wolfe v. Metropolitan Dade County, Florida*, No. 95-2351-CIV-NESBITT (S.D. Fla. April 14, 1997) (Magistrate's recommended decision); *Almonte v. Coca-Cola*, 1997 U.S. Dist. LEXIS 3189 (D. Conn. March 11, 1997); *Brummett v. Copaz Packing Corp.*, 954 F. Supp. 160 (S.D. Ohio 1996) (combined opinion affecting cases brought by ten plaintiffs); *Engle v. Ametek, Inc.*, No. 3:95 CV 7028 (N.D. Ohio Oct. 22, 1996); *Dickerson v. UPS*, 1996 U.S. Dist. LEXIS 20668 (N.D. Texas Oct. 24, 1996); *Henry v. Colonial Baking Co.*, 952 F. Supp. 744 (M.D. Ala. 1996); *Jessie v. Carter Health Care Ctr.*, 930 F. Supp. 1147 (E.D.

other hand, in six recent cases outside the Fourth Circuit, district courts declined to follow *Austin* and held that statutory employment discrimination claims are not subject to arbitration provisions in CBAs.[6] Finally, in addition to the case at bar, at least four other cases are pending in the Seventh Circuit involving the issue raised by this petition.[7]

The existence of these pending cases makes this issue particularly worthy of review by this Court. *Cf. Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (granting certiorari because of a conflict in decisions of the federal courts of appeals and the fact that "a considerable

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Ky. 1996); *Hapgood v. City of Warren*, 1996 Ohio App. LEXIS 4684 (Ohio Ct. App., 11th Dist., Trumbull County, Oct. 25, 1996), *discretionary appeal not allowed*, 78 Ohio St. 3d 1428, 676 N.E.2d 533 (1997).

[6] *See Nieves v. Individualized Shirts et al.*, 1997 U.S. Dist. LEXIS 5861 (D. N.J. April 28, 1997); *Gray v. Toshiba America Consumer Products, Inc.*, 1997 U.S. Dist. LEXIS 5697 (M.D. Tenn. Jan. 16, 1997); *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737 (N.D. Cal. 1996); *Foster v. Bechtel Corporation*, 154 LRRM 2060 (N.D. Cal. Nov. 5, 1996); *Hill v. American Nat'l Can Company/Forster Fobes Glass Div.*, 952 F. Supp. 398 (N.D. Texas 1996); *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040 (E.D. Tex. 1996).

[7] In *James A. Motley v. Tractor Supply Company*, Case No. IP 95-0308-C-M/S (S.D. Ind.), proceedings have been stayed pending disposition of this petition for certiorari. (App. 48-51.) In addition, the defendants have raised the issue in *Stanislaw Noga v. KIMCO Corporation*, Case No. 96-C-G276108 (N.D. Ill.), and *Robert J. Hammond v. United Airlines, Inc. et al.*, Case No. 96-C-902C (W.D. Wis.). (App. 52-57 & 62-69.) Finally, in *Baert v. Euclid Beverage*, 954 F. Supp. 170 (N.D. Ill. 1997), the District Court rejected *Austin* just six weeks prior to the Seventh Circuit's decision in this case.

number of suits are pending in the lower courts which will turn on resolution of these issues").

Moreover, the aforementioned cases are only those in which the issue raised has been resolved in some discoverable fashion. There certainly are and will be countless other cases involving this issue because it affects virtually every union, every union member, every unionized employer and every CBA in the United States. At present, nearly fifteen percent (15%) of workers in the United States belong to a union. This amounts to roughly sixteen million (16,000,000) people who are potentially affected in a disparate fashion by the split in the Circuits regarding the issue raised by this petition. (App. 58.)

The sheer number of people and CBAs this issue affects makes it particularly worthy of review by this Court. *Cf. Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (granting certiorari regarding an issue that affected thousands of people); *Steelworkers v. Usery*, 429 U.S. 305, 307 n. 3 (1977) (certiorari granted to resolve the propriety of a common provision in union constitutions).

Moreover, this issue affects the administration of each and every federal employment discrimination statute, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, *et seq.*, the Federal Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and other similar federal statutes.

The large number of important federal statutes affected by this issue is yet another reason to grant the

writ of certiorari. *See National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 820 (1978) (certiorari granted due to the importance of the issue to the administration of the antitrust laws and one group affected by them, to wit, the agricultural community).

In addition, the split in the Circuits regarding this issue is particularly intolerable because federal law mandates uniform interpretation of CBAs throughout the nation. As this Court has repeatedly noted, the body of law regarding the interpretation of CBAs " 'is peculiarly one that calls for uniform law.' " *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), *quoting Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919).

At present, the same CBA, between the same union and the same employer, could require arbitration of union members' statutory employment discrimination claims in the Fourth Circuit, but not in the Seventh and Eighth Circuits. Moreover, as previously demonstrated, district courts in other Circuits are hopelessly divided on this issue.

TSC is aware that this issue has been presented to this Court on two previous occasions. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996); *Varner v. National Supermarkets, Inc.*, 94 F.3d 1029 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997). However, for several reasons, the circumstances surrounding TSC's petition are quite different from the circumstances surrounding the petitions in *Austin* and *Varner*.

First, *Austin* was the first federal Court of Appeals to hold that statutory employment discrimination claims are subject to arbitration provisions in CBAs. *Varner* was the first decision to the contrary from a federal court of appeals. Accordingly, at the time of the denial of the petitions in *Austin* and *Varner* there had not been a full airing of this issue in the lower courts. Since the decisions in *Austin* and *Varner*, at least nineteen courts – including the Seventh Circuit in this case – have considered this issue. *See, supra*, pages 11-12. Therefore, the issue presented by this petition is now ripe for review.

Second, neither *Austin* nor *Varner* arose under the FAA. Therefore, the petitions in those cases could not have presented the specter of numerous interlocutory appeals regarding this issue. Furthermore, when holding that statutory employment discrimination claims are not subject to arbitration provisions in CBAs, the *Varner* Court did not consider the FAA's strong policy in favor of arbitration. *See, infra*, at pages 16-22.

Finally, as previously discussed, the *Austin* and *Varner* decisions have spawned numerous conflicting decisions in the federal district courts that affect countless present and future cases. TSC respectfully submits that given this growing conflict, and the threat it poses to the orderly administration of justice, now is the time for this Court to resolve the conflict.

II. THE SEVENTH CIRCUIT'S OPINION IS CONTRARY TO THIS COURT'S PRECEDENT.

The Seventh Circuit held that "the union cannot consent *for* the employee by signing a collective bargaining

agreement that consigns enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement." (App. 23.) In rendering its opinion, the Court ignored considerable precedent of this Court regarding the enforceability of arbitration agreements under the FAA and the federal labor policy favoring arbitration. In addition, the Seventh Circuit, while correctly concluding that *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), did not control the outcome of this case, failed to apply the analysis found in *Gilmer* to this case. Furthermore, while the Court acknowledged that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), did not *compel* the Court's result, it erroneously applied *Gardner-Denver* to undercut the *Gilmer* decision. The refusal of the Seventh Circuit to apply the analysis of *Gilmer* and the other cases of this Court regarding the enforceability of statutory claims was in error.

A. The Seventh Circuit Erred In Failing To Apply the *Mitsubishi* "Legal Constraints" Analysis To The Issue.

Since the mid-1980s, this Court has decided a number of commercial cases concerning the enforceability of arbitration agreements under the FAA, 9 U.S.C. § 1, *et seq.*, and has uniformly upheld agreements to arbitrate statutory claims. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, et al. v. McMahon*, 482 U.S. 22 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). These cases represent a departure from previous precedent in which this Court and Circuit

Courts refused to uphold agreements to arbitrate statutory claims. *See, e.g., Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez*, 490 U.S. 477; *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). In this previous line of cases, the courts considered the question to be whether the statutory rights at issue were "of a character inappropriate for enforcement by arbitration." *American Safety*, 391 F.2d at 825. In *American Safety* the Second Circuit reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id.* at 827-28. The *Mitsubishi* Court noted that the Second Circuit arrived at this conclusion despite the fact that there was no explicit support in either the Sherman Act or the FAA to apply this exception to the enforceability of the arbitration clause in that case. *Mitsubishi*, 473 U.S. at 628-29.

While *Mitsubishi* declined to address the legitimacy of the *American Safety* doctrine, it did provide considerable *dicta* which expressed "skepticism" about *American Safety's* validity. *Id.* at 632-35. In addition to relying on the importance of the public policy underlying the antitrust laws, the *American Safety* court also hinged its decision on the perceived procedural inadequacy of arbitration and the potential for unequal bargaining power between the parties. *American Safety*, 391 F.2d at 826-27. In rejecting *American Safety's* arguments, this Court stated: "so long as the prospective litigant effectively may vindicate its statutory action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions." *Mitsubishi*, 473 U.S. at 637.

In *Mitsubishi* the Court noted that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternate means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. With a "healthy regard for the federal policy favoring arbitration" in mind, this Court proceeded to analyze the enforceability of the arbitration agreement. *Id.* at 626, *citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). The *Mitsubishi* Court replaced the policy driven analysis set forth in *Wilko* and *American Safety* with a "congressional intent" analysis. *Id.* at 627-28.

The *Mitsubishi* Court first drew a distinction between waiving statutory claims and choosing a forum, stating that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *Id.* at 628. Despite the distinction between waiver of statutory rights and forum selection, the Court recognized that in some situations Congress may intend to preclude a waiver of judicial remedies for the statutory rights at issue. *Id.* The inquiry a court must undertake when determining if an agreement to arbitrate is enforceable has two steps: first, the court should determine whether the parties' agreement to arbitrate covers the statutory claims at issue; second, it should examine whether legal constraints external to the parties' agreement foreclose the arbitration of those claims. *Id.*

In determining whether "legal constraints" foreclose the arbitration of statutory claims, the *Mitsubishi* Court stated that:

> if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

Id. at 628. This Court in *McMahon* added a third source of congressional intent: "the inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 226-27.

In *Gilmer*, this Court applied the *Mitsubishi* "legal constraints" analysis to hold that agreements to arbitrate claims arising under the Age Discrimination in Employment Act ("ADEA") are enforceable. 500 U.S. at 23-25. Because there was nothing in the text of the ADEA or its legislative history to preclude arbitration, this Court addressed whether compulsory arbitration of ADEA claims would be inconsistent with the statutory framework and purposes of the Act. *Id.* at 26-33. This Court "[did] not perceive any inherent inconsistency" between arbitration and the goal of the ADEA to eliminate age discrimination. *Id.* at 27. Furthermore, this Court refused to find the agreement unenforceable based on challenges to arbitration of age discrimination claims based on procedural inadequacies or unequal bargaining power and found those issues to be best determined on a case by case basis. *Id.* at 30-33.

The Seventh Circuit did not apply the *Mitsubishi* "legal constraints" analysis to the present matter.[8] While the Court implicitly found that the CBA covered at least some of the statutory claims at issue (App. 17), it did not examine whether there were any legal constraints which would foreclose the parties' agreement to arbitrate those claims. Instead, the Court relied on a series of flawed policy arguments to hold the arbitration agreements in the CBA enforceable.

First, the Seventh Circuit stated, in apparent deference to *Mitsubishi*, that the arbitration agreement in the CBA was not a "curtailment of his [the employee's] substantive rights. The only difference is the forum." (App. 17.) However, the Court also stated that "by being forced into binding arbitration [by a CBA] they [employees] would be surrendering their right to trial by jury . . . " (App. 19.) This second statement indicates that, despite *Mitsubishi*, the Seventh Circuit elevated the right to a jury trial to the level of a substantive right. *Mitsubishi* is clear that waiving the right to a trial in favor of arbitration is not the waiver of any substantive right. *Mitsubishi*, 473 U.S. at 628. Furthermore, in *Gilmer* this Court held an agreement to arbitrate an ADEA claim enforceable without any regard for the fact that the statute provided for a *jury* trial. *Gilmer*, 500 U.S. at 35. Thus, the fact that a represented employee may be "surrendering the right to

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[8] While the Seventh Circuit correctly held the FAA applicable to this action to provide the Court with jurisdiction over the case, it erroneously refused to apply the FAA analysis to the substantive issue.

a trial by jury" is not a valid reason for refusing to enforce an agreement to arbitrate.

The Seventh Circuit also relied heavily on a perceived "tension" between individual rights and majoritarian rights. It hypothesized that there could be situations in which the employee would be inadequately protected by the grievance and arbitration procedures of the CBA. This speculation is premature – there is no indication that this "tension" would exist. As this Court noted in *Gardner-Denver*, the potential "tension between contractual and statutory objectives may be mitigated where a collective bargaining agreement contains provisions facially similar to those of Title VII." *Gardner-Denver*, 415 U.S. at 57. In this case the CBA expressly incorporates substantive rights under Title VII (and the ADA and Section 1981 as well).

The Seventh Circuit's opinion also rests on the assumption that unions will not promote employees' statutory discrimination claims. First, as this Court has recognized, any procedural inadequacy in arbitration should be resolved on a case by case basis. *Gilmer*, 500 U.S. at 33. Thus, it is improper to formulate the rule based on the possibility of an employee at some time being potentially precluded from bringing a claim. Furthermore, a union has a duty to fairly represent its members, and an employee has a remedy under the NLRA if the union breached this duty. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In addition, under *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987), a union that intentionally fails to pursue discrimination claims on the grounds that they would be difficult to process and would stir resentment is liable under both Title VII and 42 U.S.C. § 1981; thus, a union

has incentive to properly process discrimination claims. Thus, the Seventh Circuit's policy arguments which focus on this perceived tension between the individual and the union are out of step with the reality of the situation.

B. Supreme Court Precedent Supports Enforcement Of The Arbitration Agreement.

The Seventh Circuit failed to recognize or apply the legal precedent which supports enforcement of the agreement in the CBA to arbitrate the statutory claims at issue.

1. Federal Labor Law.

There is a "well recognized policy of federal labor law favoring arbitration of labor disputes" which was established in the Steelworkers Trilogy. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960). An integral part of this policy is the requirement that employees exhaust grievance and arbitration procedures prior to initiating a lawsuit. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). This policy "requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union. . . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has

attempted to implement the procedures and found them so." *Id.* (emphasis in original).

The Seventh Circuit ignored this policy and its requirement that an employee attempt to utilize the grievance and arbitration procedures. Instead, the Court was quick to *assume* that the procedures would be inadequate. Such an assumption goes against the history of arbitration as the means with which to settle disputes between represented employees and their employer.

The Court also failed to recognize that under the National Labor Relations Act unions have the authority to negotiate all terms and conditions of employment on behalf of their members. 29 U.S.C. § 159. This exclusive authority operates to bar an individual employee from bargaining over his or her individual employment arrangements. *General Electric Co.*, 150 NLRB 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) ("recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly or indirectly with the employee"). Thus, the union alone has the power to negotiate with the employer over issues such as seniority, discharge, wages, hours, pension and health benefits, layoffs, recalls, grievance procedures and arbitration. This non-exhaustive list illustrates the vast authority a union has to negotiate on behalf of its members.

The union also has the ability to waive its members' right to strike and other rights protected under the NLRA. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983). The Fourth Circuit in *Austin* noted that there is no

reason to distinguish between a union bargaining away a right to strike and a union bargaining for the right to arbitrate. *Austin*, 78 F.3d 885. The right to arbitrate is a term or condition of employment for which the union solely, as the unit's bargaining representative, has the exclusive right to bargain. *See Textile Workers v. Lincoln Mills*, 353 U.S. 488 (1957).

2. *Gilmer v. Interstate/Johnson Lane Corp.*

In *Austin*, the Fourth Circuit found that this Court's decision in *Gilmer* dictated its result – that an employee under a collective bargaining agreement can be compelled to arbitrate statutory claims pursuant to that agreement. *Austin*, 78 F.3d 875, 880-86. The Eighth Circuit in *Varner* reached the opposite result and instead relied on *Alexander v. Gardner-Denver*. *Varner*, 94 F.3d 1209, 1213. While the Seventh Circuit found that neither *Gardner-Denver* nor *Gilmer* controlled its decision, it did note that there is uncertainty as to whether this Court intended to overrule *Gardner-Denver* with *Gilmer*. (App. 27.) Despite acknowledging this possibility and the fact that "[t]he Court may have so distinguished *Alexander* as to deprive it of any authoritative force . . . ," the Court erroneously utilized *Gardner-Denver* to diminish the force of *Gilmer* with respect to this case. (App. 27.) Due to the conflict in the Circuits as to which case, if either, applies to this issue, this Court should clarify its opinion on this matter and determine whether any principles remain of *Gardner-Denver* in light of *Gilmer*.

Gilmer addressed the same issue present in this case – whether an agreement to arbitrate statutory claims is

enforceable. *Gilmer*, 500 U.S. at 35. While TSC agrees with the Seventh Circuit that neither *Gilmer* nor *Gardner-Denver compels* the result of this case, it submits that it was in error for the Seventh Circuit to disregard *Gilmer's* analysis when deciding this case. In *Gilmer*, this Court determined that agreements to arbitrate statutory claims under the Age Discrimination in Employment Act ("ADEA") could be upheld. *Id.* at 23. This Court applied the analysis it had developed under the Federal Arbitration Act ("FAA") and determined that because the plaintiff had agreed to arbitrate his statutory claims, he carried the burden of proving that Congress intended to preclude a waiver of a judicial forum for ADEA claims. *Id.* at 26, citing *McMahon*, 482 U.S. at 227. In *Gardner-Denver*, this Court decided whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *See Gilmer*, 500 U.S. at 35. This Court held that an employee who was covered by a collective bargaining agreement was not precluded from bringing a statutory claim in court despite having previously submitted his claim to arbitration. *Gardner-Denver*, 415 U.S. at 59-60.

This Court in *Gilmer* distinguished that case from *Gardner-Denver* on three grounds: first, the cases addressed different issues; second, in *Gardner-Denver*, the arbitration occurred in the context of a collective bargaining agreement and the concern was the tension between collective representation and individual statutory rights; and finally, *Gardner-Denver* wasn't decided under the FAA. *Gilmer*, 500 U.S. at 35.

The Seventh Circuit addressed these three distinctions and determined that "[o]n balance our case is closer

to *Alexander* . . . " (App. 27.) This determination was in error. Clearly, the underlying issue in this case is the same issue addressed in *Gilmer* – the enforceability of an agreement to arbitrate statutory claims – and not, as in *Gardner-Denver*, the preclusive effect of a prior arbitration award. Because the issue in this case is the same issue addressed in *Gilmer*, the *Mitsubishi* "legal constraints" analysis of the issue found in *Gilmer* should have been applied.

When the *Austin* Court applied this analysis, it held that an otherwise enforceable agreement to arbitrate should not be declared unenforceable simply because it occurs within the context of a collective bargaining agreement. 78 F.3d at 885. *Austin* found that because the plaintiff's union had the authority to bargain the terms and conditions of her employment, the arbitration agreement was voluntary and thus enforceable. *Id.* The Seventh Circuit should have followed the *Austin* Court and found the agreement enforceable. Additionally, in *Gilmer*, Interstate was a member of the NYSE, and the NYSE, not Interstate, entered into the agreement to arbitrate. *Gilmer*, 500 U.S. at 23. Just as the agreement in *Gilmer* would require Interstate to arbitrate any dispute between it and Gilmer, a collective bargaining agreement requires an employee to arbitrate his or her claims against the employer. Both Interstate and the employee, by virtue of their membership in the NYSE and union, respectively, have consented to be bound by the actions of the group to which they belong. Moreover, the employee's union is authorized by law to represent him or her in bargaining.

In addition, the other two points of distinction between *Gilmer* and *Gardner-Denver* do not, as the Seventh Circuit concluded, put this case "closer to *Alexander*." As discussed above, the "tension" between individual rights and collective representation is negated by the fact that the collective bargaining agreement incorporates the statutory law. The *Austin* Court also dismissed this concern by finding the plaintiff party to a voluntary agreement. 78 F.3d at 883 n. 2. Similarly, in the present matter, Pryner is a party to the CBA which is a voluntary agreement negotiated by his statutorily authorized representative and which incorporates the statutory law at issue. Furthermore, in the event that an employee was precluded from any forum by its union, he or she could bring a claim for breach of the duty of fair representation or under Title VII or Section 1981 against the union. Any "tension" is largely speculative and should not operate to prevent enforcement of the arbitration agreement.

The final point of distinction is whether the FAA applies to the substantive issue. As discussed above, the Seventh Circuit erroneously failed to apply the FAA to its analysis of this case. Because the FAA (*and* federal labor policy favoring arbitration) applies to this case, this point actually brings the present case further in line with *Gilmer*.

C. Title VII And The ADA Specifically Encourage Arbitration.

Finally, not only are there no legal constraints which prohibit enforcing the arbitration agreements, but the law

specifically *encourages* arbitration. Five months after this Court decided *Gilmer*, Congress passed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071. This Act, amending Title VII and 42 U.S.C. § 1981, states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title." Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081. The Americans With Disabilities Act contains identical language: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212. The meaning of this language is clear – Congress is in favor of arbitration of these claims. *See Austin*, 78 F.3d at 881.

Given the conflict in the Circuits as well as the Seventh Circuit's failure to follow established precedent, TSC respectfully submits that this Court should accept this case for hearing and find that an agreement to arbitrate statutory claims is enforceable notwithstanding that it is part of a collective bargaining agreement.

III. THE INTERLOCUTORY NATURE OF THE JUDGMENT BELOW IS NOT A BAR TO GRANTING THE WRIT.

Review of the Seventh Circuit's decision in the case at bar is appropriate notwithstanding its interlocutory nature for several reasons. First, this Court will review an interlocutory decision that raises an issue that meets the

criteria for certiorari if the issue " . . . is fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (certiorari granted after the Court of Appeals remanded for trial). Clearly, whether a case should be arbitrated or litigated is fundamental to the further conduct of any case.

Second, review of the Seventh Circuit's decision at this time is necessary to preserve the orderly administration of justice. As previously discussed, the Second Circuit held in *Cotton v. Sloan*, 4 F.3d 176, 180 (2nd Cir. 1993), that a defendant that loses a motion to compel arbitration *must* pursue an interlocutory appeal pursuant to Section 16 of the FAA, 9 U.S.C. § 16 (see App. 45-46), or waive the issue of arbitrability. Accordingly, if the issue raised by this petition is not resolved at this time, the federal courts of appeals – and this Court – are threatened with a flood of interlocutory appeals regarding this issue.

Finally, no facts will be developed on remand that will affect the outcome of the issue raised by this petition, and the legal issues raised by this petition have been thoroughly debated in the lower courts as discussed, *supra*, in Section I. Therefore, the issue raised by this petition is ripe for review by this Court. Moreover, review of the Seventh Circuit's decision at this time is particularly appropriate because it will ensure the orderly administration of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 15th day of May, 1997.

Respectfully submitted,

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**Vincent L. PRYNER, Plaintiff-Appellee,
Counterclaim Defendant,**

v.

**TRACTOR SUPPLY COMPANY, Defendant-Appellant,
Counterclaim Plaintiff.**

Eugene SOBIERAJSKI, Plaintiff-Appellee,

v.

**THOESEN TRACTOR & EQUIPMENT COMPANY,
Defendant-Appellant.**

Nos. 96-2437, 96-2892.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 12, 1996.

Decided March 20, 1997.

Employee brought employment discrimination action against his former employer. The District Court for the Southern District of Indiana, John Daniel Tinder, J., 927 F.Supp. 1140, denied employer's motion for summary judgment or, in alternative, to stay proceedings pending arbitration. Another employee brought discrimination action against his former employer. The District Court denied employer's motion to stay suit pending arbitration. Employers appealed, and appeals were consolidated. The Court of Appeals, Posner, Chief Judge, held that: (1) parties to employment contracts in nontransportation industries can appeal from orders denying stays pending arbitration, but parties to employment contracts in transportation industries cannot, and (2) workers'

statutory rights are arbitrable if worker consents to have them arbitrated.

Affirmed.

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Before POSNER, Chief Judge, and COFFEY and MANION, Circuit Judges.

POSNER, Chief Judge.

We have consolidated the appeals in two employment discrimination cases that raise the same two issues: Are arbitration clauses in collective bargaining agreements other than in the maritime, railroad, and other transportation industries subject to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.? And can a collective bargaining agreement compel an employee to arbitrate a claim that he may have under one of the federal statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Americans with Disabilities Act, that confer litigable rights on employees? The first issue is critical to our jurisdiction of these appeals; the second is the issue on the merits – which, of course, we can reach only if we satisfy ourselves that we have jurisdiction.

Each of the two plaintiffs is a former employee of one of the defendants, and each was discharged by his employer in alleged violation of federal law. Pryner is black and complains that he was discharged in violation

of Title VII and of 42 U.S.C. § 1981 because of his race and also because he had complained about Tractor Supply's previous racial discrimination against him before he was fired; he also has a claim under the Americans with Disabilities Act. Tractor Supply has counterclaimed against Pryner, but the counterclaim is not involved in this appeal. Sobierajski complains of having been discharged because of his age (58 at the time of the discharge), in violation of the Age Discrimination in Employment Act, and because of a disability, in violation of the ADA.

Both plaintiffs were employed under collective bargaining agreements. The agreement between defendant Thoesen and Sobierajski's union, the automobile mechanics union, provided that "in accordance with applicable Federal and State law, neither the company nor the Union will discriminate against employees covered by this collective bargaining agreement in regard to any terms or conditions of employment on the basis of race, creed, religion, national origin, sex or age." The agreement between Tractor Supply and Pryner's union, the teamsters, contains a similar provision but does not refer to federal or state law and adds to the prohibition against discrimination in regard to any "terms or conditions of employment" a prohibition against discrimination "with respect to hiring [or] compensation." Both agreements authorize the employer to impose discipline on an employee, up to and including discharge, for "just cause." And both contain a clause that creates a grievance procedure, making the union the employee's griever and culminating in arbitration if the matter is not resolved in

the earlier stages of the procedure, for disputes involving "interpretation or application" of the agreement.

Both Sobierajski and Pryner invoked the grievance procedure in their respective collective bargaining agreements. Pryner's union struck out at the earlier stages of the grievance procedure, and has demanded arbitration. Sobierajski's grievance, however, was abandoned, though whether by his own actions or those of the union is unclear. Pryner and Sobierajski then filed these discrimination suits, seeking damages (including punitive damages in the case of Pryner), attorneys' fees, and reinstatement. The defendants moved to stay the suits pending arbitration of the plaintiffs' claims. The motions were denied (*Pryner's in Pryner v. Tractor Supply Co.*, 927 F.Supp. 1140 (S.D.Ind.1996)), and the defendants have appealed from these denials. Sobierajski may be barred from seeking arbitration, having failed to exhaust his remedies. In that event, the stay would be pointless. But failure to exhaust contractual remedies would presumably bar his suit if, as the employers argue, the arbitration clauses in these collective bargaining agreements preclude suits to enforce statutory rights; otherwise the worker could circumvent the clause by disabling himself from seeking arbitration. So Thoesen also filed a motion in the district court to dismiss Sobierajski's suit, and it was also denied. The question whether failure to exhaust the prearbitration grievance procedure would be a bar to suing is independent of the effect of the arbitration clause and was not raised in Thoesen's motion. We express no view on it.

The issue of our appellate jurisdiction is whether these two appeals are authorized by the Federal Arbitration Act. The denial of a stay of proceedings before the court asked to grant the stay is not a final decision within the meaning of 28 U.S.C. § 1291, but when it is the denial of a stay of those proceedings pending arbitration it nevertheless is appealable immediately, at least (and probably at most, see *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co.*, 84 F.3d 988, 990-92 (7th Cir.1996)) if the motion is filed under the arbitration act, which expressly authorizes such appeals. 9 U.S.C. § 16(a)(1)(A). See *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir.1996). The act covers maritime transactions and transactions involving interstate commerce. 9 U.S.C. § 2. But "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are specifically excluded by section 1.

If "engaged in foreign or interstate commerce" is given its usual modern legal meaning, virtually all employment contracts are within the exclusion, including the two collective bargaining agreements upon which the defendants based their motions for a stay. Some courts so read it. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1120 (3d Cir.1993); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310-12 (6th Cir.1991); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir.1989); *United Food & Commercial Workers v. Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir.1989). Others confine the exclusion to collective bargaining agreements, as in *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F.2d 221, 224 (4th Cir.1954); see also

Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067 (4th Cir.1993). Others deem the arbitration act superseded with regard to such agreements by section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 – as did we in *Martin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239, 1244 (7th Cir.1990), and the cases cited there. But in *International Union of Operating Engineers v. Murphy Co.*, 82 F.3d 185, 188-89 (7th Cir.1996), we assumed the opposite (that the arbitration act is not superseded by section 301), without citing Martin. And in *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1504 (7th Cir.1991), decided between *Martin* and *International Union of Operating Engineers*, we had described the issue of supersession as an open one.

A footnote in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n. 9, 108 S.Ct. 364, 372 n. 9, 98 L.Ed.2d 286 (1987), says that the arbitration act does not apply to labor arbitration. But the footnote gives no reason; is inconsistent with the Supreme Court's subsequent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n. 2, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991), which expressly left the question open; and goes on to cite with apparent approval our decision in *Pietro Scalzitti Co. v. International Union of Operating Engineers*, 351 F.2d 576, 579-80 (7th Cir.1965), which, limiting the exclusion of employment contracts in section 1 to workers engaged in the physical movement of goods in interstate or foreign commerce, holds that the arbitration act applies to labor arbitration in all industries except transportation. See also *Briggs & Stratton Corp. v. Local* 232, 36 F.3d 712, 714-15 (7th Cir.1994); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir.1984); *Cole*

v. Burns Int'l Security Services, 105 F.3d 1465, 1469 (D.C.Cir.1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-602 (6th Cir.1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir.1972). This is acknowledged to be the "prevailing view" of the scope of the exclusion by an opponent. Matthew W. Finkin, " 'Workers' Contracts' Under the United States Arbitration Act: An Essay in Historical Clarification," 17 Berkeley J. Employment & Labor L. 282, 290 (1996).

But aren't we on both sides of the issue? We have cases like Martin that hold that section 301 supersedes the Federal Arbitration Act, a case that assumes it does not (International Union of Operating Engineers), and cases such as Briggs & Stratton that imply not by confining the exclusion in section 1 to transportation workers and saying nothing about supersession by section 301. This internal conflict is, fortunately, illusory. The cases that say that section 301 supersedes the arbitration act for cases within section 301's domain hold (all but *Martin itself and Cleveland v. Porca Co.*, 38 F.3d 289, 296 n. 5 (7th Cir.1994)) only that particular provisions of the act, such as its limitations periods (three months for moving to vacate an award, one year for enforcing it), are superseded, and do not mention the provision allowing interlocutory appeals. We shall see that these holdings are consistent with the act's being generally applicable to collective bargaining agreements provided that the workers covered by the agreement are not engaged in transportation and federal common law created under the aegis of section 301 is used to determine any substantive issues that arise in proceedings to vacate or enforce the

arbitration award. See, e.g., *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir.1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9, supra*, 739 F.2d at 1162.

Professor Finkin argues that the prevailing view, which limits the exclusion in section 1 to employment contracts in transportation, is wrong. His review of the legislative history (the arbitration act was passed in 1925) has persuaded him that Congress's intention was to exclude all employment contracts. Yet, as he acknowledges, the impetus for the exclusion came entirely from the seafarers union, concerned that arbitrators would be less favorably inclined toward seamen's claims than judges were. Judges favored such claims, the union thought, in part because of a tradition that seamen were "wards in admiralty," in part because of peculiarities of maritime law that would make it easy to slip an arbitration clause into a maritime employment contract without the seaman's noticing it, and in part because the maritime employment relation was already heavily regulated by federal law. It was soon noticed that the railroad industry's labor relations were also heavily regulated – by a statute (the Railway Labor Act) that included provisions for compulsory arbitration of many disputes. Motor carriers were not yet comprehensively regulated, but it may have seemed (and was) only a matter of time before they would be: hence the expansion of the exclusion from seamen to railroad to other transportation workers. It seems to us, as it did to the Third Circuit in *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers*, 207 F.2d 450, 452-53 (3d Cir.1953), that this history supports rather than undermines limiting "engaged

in foreign or interstate commerce" to transportation. To impress the modern meaning on the quoted term, moreover, would both make the reference to seamen and railroad workers superfluous and give the exclusion a breathtaking scope. It would mean that an arbitration clause in an employment contract between a giant multinational corporation and its chief executive officer would, though plausibly "involving" interstate commerce within the meaning of section 2, not be enforceable in federal court. Such a result would not answer to any concern expressed to or by Congress in the debates leading up to the passage of the arbitration act.

Even if as we believe the collective bargaining agreements in this case are not excluded from the act's coverage by section 1's reference to employment agreements, they might be excluded, as some courts believe, by section 301 of the Taft-Hartley Act. Section 301(a), which makes collective bargaining agreements enforceable in the federal courts, was interpreted in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), to require that principles of federal common law be developed and used to interpret such agreements. There is no reference in section 301 to arbitration, which becomes an issue in a section 301 case only when a collective bargaining agreement happens to contain (as most such agreements do) an arbitration clause. The question is then whether, despite its silence about arbitration, section 301 repealed the Federal Arbitration Act with respect to collective bargaining agreements that would otherwise be within the act's scope. This seems hardly likely, quite apart from the venerable but contested principle that repeals by implication are disfavored

and so are to be avoided unless there is no way to reconcile the two statutes. *TVA v. Hill*, 437 U.S. 153, 189-90, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 117 (1978); *Vaughn v. Sullivan*, 83 F.3d 907, 913 (7th Cir.1996); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir.1993); *Blanco v. United States*, 775 F.2d 53, 61 (2d Cir.1985) (Friendly, J.).

The cases that decline to apply the arbitration act's three-month statute of limitations to suits under section 301 to set arbitration awards aside (e.g., *Sullivan v. Gilchrist*, 87 F.3d 867, 870 (7th Cir.1996); *Chauffeurs, Teamsters, Warehousemen & Helpers Local Union v. Jefferson Trucking Co.*, 628 F.2d 1023, 1025-26 (7th Cir.1980); *Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union*, 912 F.2d 608, 610-13 (2d Cir.1990); *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328, 331 (6th Cir.1985); cf. *United Auto. Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05, 86 S.Ct. 1107, 1112-13, 16 L.Ed.2d 192 (1966)) stand for nothing more than that while the existence of two statutes both conferring federal jurisdiction over the same claim in the same case is not such an anomaly as would justify holding that one or the other was exclusive, if there are inconsistencies the courts are going to have to make a choice. See *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 481 (7th Cir. 1997). Jurisdictional redundancies are commonplace: a claim under federal law against a citizen of another state is within the jurisdiction of the federal courts under both 28 U.S.C. § 1331 and 28 U.S.C. § 1332, provided the claim is for more than $75,000. It is true, as mentioned in *Lander* and emphasized in *Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union*, supra, 912 F.2d at 611-12,

that the arbitration act reaches only disputes that are within the jurisdiction of the federal courts under some other statute, such as the diversity statute or, as here, section 301 of the Taft-Hartley Act. But all that this means, so far as the jurisdictional issue in the present cases is concerned, is that whenever the arbitration act is properly invoked there are two jurisdictional statutes in play. That is not an argument for refusing to apply one of them. And if the arbitration act is better regarded not as a source of jurisdiction at all but merely as a prescription of procedures for a class of cases otherwise within federal jurisdiction, this would actually strengthen the argument against deeming the act superseded by the presence of a "truly" jurisdictional statute such as section 301.

The arbitration act covers almost the whole field of arbitrable disputes, only a subset of which (and a small one in 1925) grow out of collective bargaining agreements. The act's limitations periods were not designed with such agreements in mind, and may not suit them. When the question arose what the statute of limitations should be in suits under section 301 to challenge arbitration awards based on such agreements (the statute contains no limitations period), the courts cast about for analogous claims from which to "borrow" a limitations period. In so doing they did not hold that section 301 had repealed the arbitration act so far as collective bargaining agreements were concerned; and when in 1988, long after section 301 had been enacted, Congress amended the arbitration act to make denials of stays pending arbitration expressly appealable despite the absence of finality, it did not carve an exception for arbitration pursuant to collective bargaining agreements. Judicial Improvements

and Access to Justice Act, Pub.L. No. 100-702, 102 Stat. 4671 (1988). That may have been an oversight, but we suspect not; for no reason is suggested why, if immediate appeals of denials of such stays are a good thing with respect to the arbitration of other types of dispute, they are a bad thing when the dispute is a labor dispute. If anything, the public interest in resolving labor disputes by arbitration, and therefore in allowing erroneous refusals to defer to arbitration to be corrected promptly, is greater than in an ordinary commercial arbitration.

The big thing that section 301 did (besides creating federal jurisdiction over suits to enforce collective bargaining agreements), so far as labor arbitration is concerned, was to ordain the creation of a body of federal common law to govern disputes arising out of such arbitration. Included in that body are limitations periods, which by analogy to the substance-procedure distinction worked out in the wake of the Erie decision fall on the substantive side of the divide. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10, 65 S.Ct. 1464, 1469-70, 89 L.Ed. 2079 (1945). The question whether a particular type of interlocutory order is immediately appealable, however, is a quintessentially procedural question to which the Federal Arbitration Act provides an answer that creates no tension with anything in either section 301 or the common law of collective bargaining agreements that has evolved under it; that in fact effectuates the policy of section 301, which is to encourage the resolution of labor disputes by means other than industrial warfare – and arbitration is prominent among those means.

Our resolution of the jurisdictional issue can be criticized as creating an arbitrary difference between the

appeal rights of parties to employment contracts, including collective bargaining agreements, in nontransportation industries and the corresponding appeal rights of parties to collective bargaining agreements and other employment contracts in transportation. Parties to employment contracts in other industries can appeal from orders denying stays pending arbitration. Parties to employment contracts in the transportation industries cannot because, excluded from the Federal Arbitration Act by section 1, they cannot rely on section 16; and section 301 of the Taft-Hartley Act has no provision, corresponding to that section, authorizing interlocutory appeals. We need not consider the likely success of efforts to construct a right to take such an appeal from other statutes, such as 28 U.S.C. § 1292(a)(1), or from judge-made doctrines of appealability such as the collateral-order doctrine; let us assume for the sake of argument that they would fail. The resulting anomaly (different treatment of labor arbitration in transportation versus nontransportation industries) would be the unavoidable consequence of an interpretation of section 1 of the arbitration act that differentiates between employment contracts in the transportation and nontransportation sectors, and that is a distinction to which this court is committed.

Another anomaly concerns the specific statutes of limitations that the courts have borrowed for use in section 301 arbitration cases. Always these are statutes of limitations applicable to arbitration awards rather than anything specially to do with labor. See, e.g., *Sullivan v. Gilchrist*, supra, 87 F.3d at 870. We have even borrowed

from arbitration statutes that are inapplicable to collective bargaining contracts! *Stevens v. Gateway Transportation Co.*, 696 F.2d 500, 502 (7th Cir.1982); *Hemmings v. Barian*, 822 F.2d 688, 690 (7th Cir.1987). Why should a state statute of limitations for arbitration cases be thought more apt to section 301 than the statute of limitations in the Federal Arbitration Act? We cannot find an answer in the cases and are given additional pause by the decisions that say, *Hygrade Operators, Inc. v. Local 333*, 945 F.2d 18, 22 (2d Cir.1991), or more commonly assume, *Local 232 v. Briggs & Stratton Corp.*, 837 F.2d 782, 788-89 (7th Cir.1988); *Evans v. Einhorn*, 855 F.2d 1245, 1246 (7th Cir.1988) (per curiam), that disputes growing out of labor arbitration arise under section 301, without mentioning the arbitration act. But American law is rarely as clear as one might like; and for the reasons that we explained earlier, we think the better view is that we do have jurisdiction of these appeals under section 16 of the arbitration act. So we may turn at last to the issue on the merits, which is whether a collective bargaining agreement can compel the arbitration of a federal antidiscrimination claim.

Two competing interests have to be considered. One is the interest in allowing unions and employers to establish a comprehensive regime for the adjustment of employment disputes; it argues for allowing the collective bargaining agreement to force all such disputes into the grievance and arbitration groove even when the dispute arises out of a claim that a worker's statutory rights have been infringed. The other is the interest in the effective enforcement of rights designed for the protection of workers whom Congress has classified as belonging to vulnerable groups, generally and in these two

cases minority groups – blacks, the disabled, and the aged (though whether persons 40 years old and older, the group protected by the age discrimination law, should be considered a vulnerable segment of the population may certainly be questioned as an original matter). That interest will be impaired if the right to bring suit in federal district court to enforce these rights is taken away from the workers.

Or will it? The employers in our two cases, supported by employer groups that have filed amicus curiae briefs, argue that the workers will actually be better off if the employers' position is adopted. Because the Equal Employment Opportunity Commission has an enormous backlog and limited resources for litigating, the vast majority of workers who have claims under any of the statutes that the Commission enforces have perforce to bring and finance their own lawsuits; they cannot rely on the Commission to do so for them. In contrast, a grievance is prosecuted by the worker's collective bargaining representative (the union) at no cost to the worker. It is true that the plaintiffs in these cases do not wish to abandon their right to invoke the grievance machinery created by the collective bargaining agreements; they just want the option of pursuing judicial remedies on top of or in lieu of their arbitral remedies. But unless the arbitral remedy is exclusive, the company's incentive to agree to negotiate an arbitration clause broad enough to encompass statutory violations will be reduced, as the only effect of such a clause will be to multiply the employee's remedies.

The employers emphasize that these collective bargaining agreements do not take away any of the workers'

substantive statutory rights, but merely substitute an arbitral for a judicial proceeding as the means of vindicating the rights. Although the arbitrator's award, whether or not confirmed, 4 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, Federal Arbitration Law § 39.6 (1994); G. Richard Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA L.Rev. 623, 642 (1988), can – this is implicit in the notion of binding arbitration – be pleaded as res judicata in the worker's federal district court suit, *Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926, 930 (7th Cir.1986); *Wolf v. Gruntal & Co.*, 45 F.3d 524, 528 (1st Cir.1995); *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir.1985); American Law Institute, Restatement (Second) of Judgments § 84(1) (1982), subject to limitations unnecessary to dwell on here, id., §§ 84(2)-(4), this is true if the worker wins before the arbitrator as well as if he loses. So there is no curtailment of his substantive rights. The only difference is the forum; the defendants are right. The plaintiffs riposte that it isn't clear that the collective bargaining agreements in our two cases are completely coextensive with the plaintiffs' statutory rights; and it isn't. But a court can properly stay a suit before it if any issue in the suit is arbitrable, even if some issues are not. The arbitration act says in fact that the court shall stay the suit, not just a piece of the suit, if the suit is "brought upon" an arbitrable issue, 9 U.S.C. § 3, though the cases, perhaps concerned lest the tail wag the dog, treat the question whether to stay the entire case as discretionary in cases involving both arbitrable and nonarbitrable issues. *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 96-97 (4th Cir.1996); *McCarthy v.*

Azure, 22 F.3d 351, 361 (1st Cir.1994); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 856 (2d Cir.1987); 2 Macneil, Speidel & Stipanowich, supra, § 23.3.1, pp. 23:12-:13. This interpretation was assumed in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218-19 and n. 5, 105 S.Ct. 1238, 1241-42 n. 5, 84 L.Ed.2d 158 (1985), though in the context of issues nonarbitrable as a matter of law, as distinct from those the parties may just not have agreed to arbitrate.

The defendants concede that to the extent that the rights conferred by the collective bargaining agreements, or the sanctions available to the arbitrators, fall short of fully vindicating the plaintiffs' substantive and remedial statutory rights, the plaintiffs will be free to resume their suits after the arbitrators render their awards, having filed the suits within the statute of limitations. But the findings made by the arbitrators might be entitled to collateral estoppel effect in the resumed suits. *Benjamin v. Traffic Executive Ass'n Eastern Railroads*, 869 F.2d 107, 110 (2d Cir.1989). We say "might" to emphasize the readiness of courts to deny that effect to arbitral awards when the arbitrator has failed to explain his findings adequately or to follow procedures likely to lead to reliable findings – "adequacy" and "reliability" being relative to the importance of the claim that the arbitrator's findings are sought to be used to block. *Dean Witter Reynolds Inc. v. Byrd*, supra, 470 U.S. at 222-23, 105 S.Ct. at 1243-44; *McDonald v. City of West Branch*, 466 U.S. 284, 289, 104 S.Ct. 1799, 1802-03, 80 L.Ed.2d 302 (1984); *Kulavic v. Chicago & Illinois Midland Ry.*, 1 F.3d 507, 513-15 (7th Cir.1993); *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir.1991).

The honey-tongued assurances of the employers' able counsel and their amici, unusually and perhaps opportunistically aligned with the unions' interest in controlling their members' access to remedies, do not persuade us that there is no genuine conflict between employer and employee interests in these cases. The plaintiffs' rights under the collective bargaining agreements are not as extensive as their statutory rights, so that to obtain complete relief they may have to undergo two trials, one before the arbitrator and the other in the district court. And by being forced into binding arbitration they would be surrendering their right to trial by jury – a right that civil rights plaintiffs (or their lawyers) fought hard for and finally obtained in the 1991 amendments to Title VII, and that they also have under the age discrimination and disability acts.

Most important, the grievance and arbitration procedure can be invoked only by the union, and not by the worker. The worker has to persuade the union to prosecute his grievance and if it loses in the early stages of the grievance proceedings to submit the grievance to arbitration. *Vaca v. Sipes*, 386 U.S. 171, 190-91, 87 S.Ct. 903, 916-17, 17 L.Ed.2d 842 (1967); cf. *Martin v. Youngstown Sheet & Tube Co.*, supra, 911 F.2d at 1244. The defendants point out that if the union arbitrarily refuses to prosecute a grievance, let alone refuses on racial or other invidious grounds to do so, the worker can bring a suit against the union for breach of its duty of fair representation of all members of the bargaining unit. *DelCostello v. Teamsters*, 462 U.S. 151, 164, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983); *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1176 (7th Cir.1995); *Conn v. GATX Terminals Corp.*, 18 F.3d 417,

420 (7th Cir.1994); *LaBuhn v. Bulkmatic Transport Co.*, 865 F.2d 119, 120 (7th Cir.1988); *Trnka v. Local Union No. 688*, 30 F.3d 60, 61 (7th Cir.1994). This raises the spectre of three suits to enforce a statutory right – the suit against the union to force it to grieve and if necessary arbitrate the grievance, the arbitration proceeding, and the resumed district court proceeding if the workers' rights under the collective bargaining agreement are more limited than their statutory rights. In any event, the union has broad discretion as to whether or not to prosecute a grievance. It may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities, just as other "prosecutors" must do, as well as its desire to maintain harmonious relations among the workers and between them and the employer. *Vaca v. Sipes*, supra, 386 U.S. at 191-92, 87 S.Ct. at 917-18; *Cole v. Burns Int'l Security Services*, supra, 105 F.3d at 1479; *Garcia v. Zenith Electronics Corp.*, supra, 58 F.3d at 1176; *Kulavic v. Chicago & Illinois Midland Ry.*, supra, 1 F.3d at 515. Corresponding to this expansive and ill-defined discretion, the scope of judicial review of its exercise is deferential. See, e.g., *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78, 111 S.Ct. 1127, 1135-36, 113 L.Ed.2d 51 (1991); *Trnka v. Local Union No. 688*, supra, 30 F.3d at 61; *Nida v. Plant Protection Ass'n National*, 7 F.3d 522, 526 (6th Cir.1993). The result is that a worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so. While the grievance machinery could in principle offer the worker a cheaper alternative to suing, it seems unlikely that the union would be any more willing to prosecute a marginal

case than a lawyer asked to handle it on a contingent-fee basis. Indeed, the union might for strategic reasons decline to prosecute a claim that would have enough merit to enable the worker to retain a lawyer on a contingent-fee basis were the worker not bound to the union.

The essential conflict is between majority and minority rights. The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit, whether they are part of the majority or for that matter even members of the union entitled to vote for union leaders – they need not be. The statutory rights at issue in these two cases are rights given to members of minority groups because of concern about the mistreatment (of which there is a long history in the labor movement, see, e.g., *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944)) of minorities by majorities. We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor. The employers' position delivers the enforcement of the rights of these minorities into the hands of the majority, and we do not think that this result is consistent with the policy of these statutes or justified by the abstract desirability of allowing unions and employers to cut their own deals. And we are given no reason to believe that the ability of unionized workers to enforce their statutory rights outside of the grievance

machinery established by collective bargaining agreements is undermining labor relations.

The defendants cite provisions added in the early 1990s to Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act that "where appropriate and to the extent authorized by law, . . . arbitration . . . is encouraged to resolve disputes arising under" these laws. Pub.L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991); 42 U.S.C. § 12212. These provisions, a polite bow to the popularity of "alternative dispute resolution" and perhaps a mild sop to the judiciary, which has expressed alarm at Congress's relentless expansion of the jurisdiction of the federal courts, encourage arbitration "where appropriate" – and if we are right it is not appropriate when it is not agreed to by the worker but instead is merely imposed by a collective bargaining agreement that he may have opposed. Nothing in the background of the amendments is inconsistent with this interpretation. It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, Pub.L. No. 102-166, § 102, § 1977A(c), 105 Stat. 1071, 1073 (1991), to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases. We know that statutes, being products of compromise, frequently reflect inconsistent aims. But if that is the case here, we might expect to find a hint of it in the statutory language or design, or in the legislative history, but we find none.

We are not holding that workers' statutory rights are never arbitrable. They are arbitrable if the worker consents to have them arbitrated. If the worker brings suit,

the employer suggests that their dispute be arbitrated, the worker agrees, and the collective bargaining agreement does not preclude such side agreements, there is nothing to prevent a binding arbitration. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir.1996); *American Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir.1990); *Gardner v. Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir.1970) (per curiam); *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 246 (3d Cir.1968). All we are holding is that the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.

Thus far we have analyzed the arbitrability of the disputes in these two cases without reference to the precedents that might be thought to govern the issue, even though the hundreds of pages of briefs are devoted to little else. That in itself is a sign that case law is unlikely to be dispositive of the issue. The authority of a previously decided case is at its greatest when it is apparent that the case does not differ in any material particular from the case in which it is cited as authority; and to show the absence of a material difference usually is easy. When instead a lawyer tries to create a mosaic of case authority from a large number of previous cases all distinguishable from the present one, what purports to be an investigation of case law is really a quest for policies or principles that can be found in the previous cases and are thus legitimate factors to guide the decision of a new case. Those factors we have discussed. Both sides of these appeals also are able to cite a case or two that squarely

support their position – cases that really do not differ in any material particular from the present one – but in doing so all they have done is identify a circuit split. Compare *Austin v. Owens-Brockway Glass Container, Inc.*, supra, 78 F.3d at 885, with *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir.1996).

Each side has its favorite Supreme Court case that it has flogged mercilessly to yield the desired holding. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), arose out of a Title VII suit like Pryner's brought by a black employee against his employer. The employee was a member of a bargaining unit represented by a union that had negotiated a collective bargaining agreement materially identical to that in Pryner's case. His claim was pressed by the union in a grievance proceeding that eventuated in arbitration, and the arbitrator found that *Alexander* had been discharged for just cause, which in the employer's view precluded a Title VII suit. The Supreme Court disagreed. It held that the arbitration of a contractual right not to be discriminated against does not preclude enforcement of a statutory right. This is not quite the same thing as holding that the worker does not have to go through the arbitration process. But as we mentioned earlier, the parties to our cases all assume that if Pryner and Sobierajski must go through arbitration they also must abide by its result, though one possible result is the arbitrators' concluding that they lack authority under the collective bargaining agreements to render complete, or perhaps any, relief, in which event there would be room for further litigation.

By stressing, somewhat formalistically it might seem, the "distinctly separate nature" of contractual and statutory rights, 415 U.S. at 50, 94 S.Ct. at 1020-21, the Supreme Court sowed the possibility of distinguishing Sobierajski's case. For his collective bargaining agreement mentions federal and state law and could therefore be deemed consent to the arbitrators' enforcing statutory as well as contractual rights. The defendants note this, but put most of their weight on the Supreme Court's subsequent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, supra. Gilmer, a stockbroker, signed a registration agreement with the New York Stock Exchange (that is, an agreement that permitted him to register as a broker with the exchange) in which he consented to the arbitration of any dispute arising out of his employment by a member of the exchange. Later he claimed that his employer had discriminated against him in violation of the Age Discrimination in Employment Act. The Court held that he had to submit his claim of age discrimination to arbitration. Although the arbitration clause was not in the employment contract (if it had been the Court would have had to decide the applicability of the Federal Arbitration Act to nontransportation employment contracts), but in the registration agreement to which the employer was not a party, the employer had required Gilmer to sign the registration agreement as a condition of his employment.

Although the Court did not overrule *Alexander*, it did say that the mistrust of the arbitral process that had permeated that opinion had been "undermined" by subsequent decisions evincing a positive attitude toward arbitration. 500 U.S. at 34 n. 5, 111 S.Ct. at 1656 n. 5. It

also distinguished *Alexander* from Gilmer's case on three grounds. The first was that the arbitration in *Alexander* had "occurred in the context of a collective-bargaining agreement," creating a "tension between collective representation and individual statutory rights." *Id.* at 35, 111 S.Ct. at 1657. An attenuated version of that tension was present in *Gilmer* itself, because Gilmer's employer had forced him as a condition of his employment to sign a nonnegotiable form contract with the New York Stock Exchange that contained an arbitration clause. But Gilmer's access to arbitration, if a dispute arose, was not controlled by a union, or any other entity or individual. At all events the Court treated his situation as being different from Alexander's.

The second distinction drawn in *Gilmer* was that the issue in the earlier case had been the preclusive effect of an arbitration award concerning a contractual right on the litigation of a statutory right, rather than (as in *Gilmer*) the enforceability of the agreement to arbitrate the statutory claim. The third distinction was that *Alexander* had not been decided under the Federal Arbitration Act. This was not to say that the act had been totally inapplicable, but only that, as we saw earlier, substantive issues in suits that are within the scope of both the arbitration act and section 301 of the Taft-Hartley Act are governed by section 301. So the third ground of distinction ties back to the first, and like the first puts our two cases on the *Alexander* side of the line – while the second distinction seems to be a distinction without a difference, since the Court assumed, consistent with what we said earlier about the preclusive effects of arbitration awards, that Gilmer could not bring an age discrimination suit if

he lost the arbitration proceeding. 500 U.S. at 28, 111 S.Ct. at 1653. But for what the distinction is worth, it tugs our cases a little closer to *Gilmer*, since here as there the issue is the enforceability of the arbitration clause in a collective bargaining agreement rather than the effect of the award in an arbitration of a contractual right on the right to sue to enforce a statutory right.

On balance our case is closer to *Alexander*; but is enough left of *Alexander* to compel a decision in favor of the plaintiffs? Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so. *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir.1996), cert. granted, ___ U.S. ___, 117 S.Ct. 941, 136 L.Ed.2d 831 (1997). The conservative reading of *Gilmer* is that it just pruned some dicta from *Alexander* – and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights. That issue was not before the Court or discussed by it. The Court may have so distinguished *Alexander* as to deprive it of any authoritative force; but that is the most it did and by doing so opened what till then had been a closed issue. It did not resolve the issue, which for the reasons stated earlier we believe should be resolved in favor of the plaintiffs' right to sue. The district judges were therefore right to deny the defendants' motions for stays of the judicial proceedings pending arbitration.

AFFIRMED.

Vincent L. PRYNER,
Plaintiff/Counterclaim-Defendant,

v.

TRACTOR SUPPLY COMPANY, INC.,
Defendant/Counterclaim-Plaintiff.

No. IP 95-211-C-T/G.

United States District Court,
S.D. Indiana,
Indianapolis Division.

May 28, 1996.

Former employee brought action against employer, alleging Title VII race discrimination, disability discrimination in violation of Americans with Disabilities Act (ADA), and Title VII retaliatory discharge. Employer counterclaimed that employee and coemployee conspired to deprive various employees of equal protection of the laws in violation of civil rights statute. Employer moved for summary judgment or, in the alternative, to stay proceedings pending arbitration. The District Court, Tinder, J., held that, even assuming provisions of Federal Arbitration Act applied, neither employee's prior arbitration under his collective bargaining agreement of claims now brought before court, nor his failure to previously arbitrate said claims, had any bearing upon his right to enforce statutory rights now asserted.

Motion denied.

Bobby Allen Potters, Indianapolis, IN, for Plaintiff.

Charles W. Pautsch, Wessels & Pautsch, Milwaukee, WI, for Defendant.

Entry Regarding Defendant's Motion for Summary Judgment or, In the Alternative, to Stay Proceedings Pending Arbitration

TINDER, District Judge.

This matter comes before the court upon Defendant Tractor Supply Company's ("TSC") motion for summary judgment or, in the alternative, motion to stay proceedings pending arbitration. The court, having considered the motion and the submissions of the parties, finds that the Defendant's motion for summary judgment with respect to the remainder of the Plaintiff's claims or, in the alternative, to stay the proceedings pending arbitration should be **DENIED** for the reasons set forth below.

I. Background Facts and Procedural History

The Plaintiff, Vincent L. Pryner ("Pryner"), was employed by TSC at its warehouse facility in Indianapolis, Indiana from September 13, 1985 until his termination on February 22, 1996. Following a sixty-day probationary period at the beginning of his employment, the terms and conditions of Pryner's employment have been governed by a succession of collective-bargaining agreements ("CBA") between TSC and Chauffeurs, Teamsters, Warehousemen and Helpe[illegible] Local Union No. 135 (the "Union"). Details of Pr[illegible] early work history were not provided, but there were no indications of any

problems until Pryner's allegations that he had been subjected to a racially-hostile work environment since January 1992.

The CBA relevant to the period at issue in the case at bar contains a "Grievance and Arbitration Procedure" for the resolution of any disputes "involving interpretation or application of the provisions of this Agreement." (Def.'s Ex. 3 at 14.) Said procedure provides for a three step grievance adjustment process followed by arbitration which is "final and binding on both parties." (*Id.* at 16.) The CBA also contains the following "miscellaneous" provisions relevant to the instant inquiry:

> *Section 2 – No Discrimination*
>
> The Company agrees that it will not discriminate against any associate for employment for or on account of his affiliation or activities with the Union. The Company and Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of an individual's race, color, religion, age, sex, or national origin. Nor will the Company limit, segregate or classify associates in any way to deprive any individual associate of employment opportunities because of race, color, religion, age, sex, veteran or national origin.
>
> *Section 3 – The Americans With Disabilities Act (ADA)*
>
> Due to the Americans with Disabilities Act or the regulations promulgated thereunder, the Company may be required to make a reasonable accommodation to the disability of an applicant or incumbent associate that may be in conflict

> with provisions of this Agreement. In such event, the Company shall be privileged to make such accommodation notwithstanding the requirements of this Agreement. The Company shall notify the Union thereafter as soon as is practicable of such situation on a confidential basis.

(*Id.* at 25.)

On February 17, 1995, Pryner filed the instant complaint against TSC, which was amended with leave of the court on July 12, 1995. Count I of the amended complaint alleges that TSC discharged Pryner from his employment on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981; Count II alleges that Pryner was discharged from his employment on the basis of his disability in violation of the ADA; and Count III alleges that TSC retaliated against Pryner for having filed a complaint of discrimination, also in violation of Title VII.[1] In its answer, TSC counterclaimed that Pryner and James A. Motley, another TSC employee, conspired to deprive various TSC employees of the equal protection of the laws in violation of 42 U.S.C. § 1985(3).

On April 4, 1994, the Defendant moved for summary judgment or, in the alternative, a stay of the instant action pending arbitration of the Plaintiff's complaints, on the ground that the mandatory arbitration provisions of the CBA divest this court of subject matter jurisdiction in this

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[1] It is expected that the Plaintiff will again move to amend his complaint to include a count regarding his most recent discharge. However, said event is not presently before the court.

case. The matter has been fully briefed and is now ripe for adjudication.

II. Summary Judgment Standard

The Seventh Circuit stated the standard for summary judgment in *Howland v. Kilquist*, 833 F.2d 639 (7th Cir.1987).

> Fed.R.Civ.P. 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." When the facts are disputed, the parties must produce proper documentary evidence to support their contentions, and may not rest on mere allegations in the pleadings, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983), or upon conclusory statements in affidavits. *First Commodity Traders v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir.1985). In reviewing a grant of summary judgment, all reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Matsushita Elecs. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986). . . . The mere existence of a factual dispute will not bar summary judgment unless "the disputed fact is outcome determinative under governing law." *Egger v. Phillips*, 710 F.2d

292, 296 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918, 104 S.Ct. 284, 78 L.Ed.2d 262 (1983).

Id. at 642.

The Supreme Court further clarified the scope of Federal Rule of Civil Procedure 56 in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In *Celotex*, the Court held that the initial burden is on the moving party to demonstrate "with or without affidavits" the absence of genuine issues of material fact and that, absent such material facts, judgment should be granted as a matter of law in the moving party's favor. 477 U.S. at 323, 106 S.Ct. at 2552-53. Once the moving party has met its burden, the opposing party must "go beyond the pleadings" and designate specific facts to support or defend each element of the claim, demonstrating a genuine issue for trial. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53; *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir.1990). Not every factual dispute creates a barrier to summary judgment, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

III. Discussion

The crux of the Defendant's argument is that the decision of the United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), requires a finding that Pryner's

sole remedy in this proceeding is the arbitration to which he agreed in the CBA. In support of this argument, the Defendant points to the recent decision of the Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.1996).

In addressing this issue, the court must begin with the Supreme Court's unanimous decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In *Gardner-Denver*, the plaintiff, an African-American union member employed pursuant to a collective-bargaining agreement, claimed that his discharge by the defendant was the result of racial discrimination. The plaintiff initially filed a grievance under the broad arbitration provisions of his collective-bargaining agreement. Prior to the arbitration hearing, the plaintiff filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 38-42, 94 S.Ct. at 1015-17.

The arbitrator ruled that the plaintiff had been "discharged for just cause." Thereafter, the EEOC determined that no reasonable cause existed to support a finding that any violation of Title VII had occurred and issued the plaintiff a right to sue letter. The plaintiff subsequently filed an action in federal court alleging that his discharge had resulted from a racially-discriminatory employment practice in violation of Title VII. *Gardner-Denver*, 415 U.S. at 42-43, 94 S.Ct. at 1016-17.

The district court granted the defendant's motion for summary judgment and dismissed the action. "The court found that the claim of racial discrimination had been

submitted to the arbitrator and resolved adversely to [the plaintiff]. It then held that [the plaintiff], having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII." *Gardner-Denver*, 415 U.S. at 43, 94 S.Ct. at 1017. The Tenth Circuit affirmed the decision of the district court. *Id.*

In reversing, the Supreme Court noted that the grievance procedure in the collective-bargaining agreement was intended to vindicate the plaintiff's *contractual* rights, while Title VII created an independent *statutory* right to be free from racial discrimination. *Gardner-Denver*, 415 U.S. at 49-50, 94 S.Ct. at 1020-21. The Court then stated that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Id.* at 50, 94 S.Ct. at 1020. The Court held that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII." *Id.* at 59-60, 94 S.Ct. at 1025.

The next major element in the analysis is the Court's subsequent decision in *Gilmer*. In *Gilmer*, the plaintiff was required, by his employer, to register as a securities representative with, among others, the New York Stock

Exchange ("NYSE"). The plaintiff's registration application with the NYSE contained an agreement to arbitrate when so required by the NYSE rules and those rules provided for arbitration of any controversy arising out of a registered representative's employment or termination of employment. 500 U.S. at 23, 111 S.Ct. at 1650-51.

The defendant terminated Gilmer at age sixty-two. Thereafter, Gilmer filed a charge with the EEOC alleging that he had been discharged because of his age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). The defendant moved to compel arbitration of the matter in accordance with the arbitration agreement in Gilmer's NYSE registration application and the Federal Arbitration Act ("FAA"). Relying upon *Gardner-Denver*, the district court denied the defendant's motion and the Court of Appeals for the Fourth Circuit reversed. *Gilmer*, 500 U.S. at 23-24, 111 S.Ct. at 1650-51.

In affirming the decision of the Fourth Circuit, the Supreme Court first noted that statutory claims may be the subject of an arbitration agreement enforceable under the FAA and that, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[2] *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652 (quotation omitted). Consequently, because Gilmer had agreed to arbitrate his statutory claims, the Court found that, in order to avoid said

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[2] For the purposes of the instant entry, the court will assume without deciding that Pryner, in his individual capacity, could agree to arbitrate all of the statutory claims which he has brought in this action.

arbitration clause, the burden was upon the plaintiff to demonstrate that Congress intended to preclude the waiver of a judicial forum for the statutory claim – ADEA – in question. *Id.* The Court held that Gilmer had failed to meet his burden of demonstrating that "Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.* at 35, 111 S.Ct. at 1657. Accordingly, the Court found that the arbitration agreement in Gilmer's NYSE registration application should be enforced. *Id.*

Completing the analysis is the Fourth Circuit's recent decision in *Austin*. In *Austin*, the plaintiff, a union employee governed by a collective-bargaining agreement, was injured in a job-related accident after fourteen years in the defendant's employ. Thereafter, the plaintiff was released for light-duty work, but was told that none was available. Instead, she was placed on leave and provided with worker's compensation benefits. While Austin was on leave, the defendant eliminated her position and terminated her employment. 78 F.3d at 877.

Austin filed suit against the defendant alleging violation of both Title VII and the ADA. The defendant moved to dismiss on the grounds that Austin was precluded from filing suit in federal court because she was bound by the mandatory arbitration clause of her collective-bargaining agreement. *Austin*, 78 F.3d at 878. The district court agreed and found that *Gilmer* precluded Austin from bringing the lawsuit because she had agreed in her collective-bargaining agreement to resolve the dispute via binding arbitration. *Id.* A divided panel of the Fourth Circuit affirmed. *Id.* at 886.

Clearly, if the decision of the Fourth Circuit is a correct pronouncement of federal law, then the instant case must be dismissed, because Pryner's sole remedy for the discrimination claimed would be pursuant to the arbitration clause in the CBA. However, it is the court's assessment that *Austin* is not an accurate interpretation of federal law as it presently stands and that the reasoning of the majority in that case would not be adopted by the Seventh Circuit if faced with a similar case.

Austin relies primarily upon *Gilmer's* holding that an individual may agree to arbitrate statutory claims, such as those found in the instant case. The fatal flaw in *Austin* is its failure to fully consider the prior holding of *Gardner-Denver*. The *Austin* court basically dismisses the decision in *Gardner-Denver* by stating that "*Gilmer* thus rejects the principal concern in . . . *Gardner-Denver* . . . , that arbitration is an 'inappropriate forum' for the resolution of Title VII statutory rights." *Austin*, 78 F.3d at 880.

It is uncontroverted that the decision in *Gardner-Denver* reflected the Court's then-current view that arbitration was inferior to judicial process for the resolution of statutory claims. *Gardner-Denver*, 415 U.S. at 56-58, 94 S.Ct. at 1023-25. Such "mistrust of the arbitral process" has plainly been overcome by more recent decisions of the Court. *Gilmer*, 500 U.S. at 34 n. 5, 111 S.Ct. at 1656 n. 5 (citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231-32, 107 S.Ct. 2332, 2340-41, 96 L.Ed.2d 185 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of

arbitration as an alternative means of dispute resolution.")).

While *Austin's* recognition that the Court's acceptance of arbitration has progressed significantly since its decision in *Gardner-Denver*, the *Austin* Court's reliance upon *Gilmer* to the exclusion of *Gardner-Denver* is clearly misplaced. *Gilmer* made a point of distinguishing, not overruling, *Gardner-Denver, see* 500 U.S. at 33-35, 111 S.Ct. at 1655-57, and the continuing vitality of *Gardner-Denver* was recognized by the Court even more recently in *Livadas v. Bradshaw*, 512 U.S. 107, ___ n. 21, 114 S.Ct. 2068, 2080 n. 21, 129 L.Ed.2d 93 (1994).

The *Gilmer* Court distinguished *Gardner-Denver*, and its progeny,[3] on three grounds, only two of which are applicable in the instant case. First, the Court again noted that an employee's contractual rights under a collective-bargaining agreement are distinct from said employees statutory rights. 500 U.S. at 34, 111 S.Ct. at 1656; *see also In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 852 F.2d 960, 965 (7th Cir.1988). This recognizes one of the classic differences between an individual employment contract between an employee and his or her employer and the contract created by a collective-bargaining agreement. While an individual may surrender any of his or her

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[3] The *Gilmer* Court recognized *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) and *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) as other cases which have involved the issue whether arbitration under a collective bargaining agreement precluded a subsequent statutory claim. *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1656-57.

statutory rights unless Congress has expressed the intent that a particular right cannot be surrendered, in the context of a collective-bargaining agreement, the rights at issue are solely those articulated within the confines of the agreement itself. In other words, while an individual employment contract can address both contractual and statutory rights, a collective-bargaining agreement, by its very nature, may only address the contractual rights of the members of the bargaining unit. "Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII."[4] *Gardner-Denver,* 415 U.S. at 53-54, 94 S.Ct. at 1022. The Court continues to recognize this dualism, even in light of its greater acceptance of the arbitral process.[5] *See, e.g.,*

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[4] For this reason, it is essentially immaterial that the CBA at issue appears to provide for rights similar or identical to those provided for in Title VII, the ADA or section 1981. The court notes that similar provisions, with the exception of the ADA, were found in the collective-bargaining agreement at issue in *Gardner-Denver,* 415 U.S. at 39, 94 S.Ct. at 1015.

[5] *Gilmer* noted as follows:

> "[A] labor arbitrator has authority only to resolve questions of contractual rights. The arbitrator's task is to effectuate the intent of the parties and he or she does not have the general authority to invoke public laws that conflict with the bargain between the parties. By contrast, in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.

500 U.S. at 34, 111 S.Ct. at 1656 (citations and quotations omitted).

Livadas, 512 U.S. at ___ n. 21, 114 S.Ct. at 2080 n. 21; *Gilmer*, 500 U.S. at 34, 111 S.Ct. at 1656.

The *Gilmer* Court next expressed its continuing "concern that in collective-bargaining arbitration the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." 500 U.S. at 34, 111 S.Ct. at 1656 (citation and quotation omitted); *see Livadas*, 512 U.S. at ___ n. 21, 114 S.Ct. at 2080 n. 21. The Court has also recognized that "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . And a breach of the union's duty of fair representation may prove difficult to establish." *Gardner-Denver*, 415 U.S. at 58 n. 19, 94 S.Ct. at 1024 n. 19. The Court's recent jurisprudence has done nothing to alleviate this concern.

The final distinction drawn by the court between the situation it faced in *Gilmer* and that in *Gardner-Denver* was that *Gardner-Denver* and its progeny were not decided under the FAA, while *Gilmer* was. *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1656-57. Likewise, the decision in *Austin* did not consider the effects of the FAA because the Fourth Circuit takes the position that the FAA is not applicable to labor disputes arising from collective-bargaining agreements. 78 F.3d at 879. It is relative to this third factor that the instant case diverges from the situation in *Gardner-Denver*.

The FAA basically effectuates arbitration agreements brought before federal courts, and it reflects a "liberal federal policy favoring arbitration agreements. . . . " *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460

U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); *accord Mitsubishi*, 473 U.S. at 625, 105 S.Ct. at 3353. The Fourth Circuit does not apply the FAA to collective-bargaining agreements because of the FAA's exclusion from coverage of "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Seventh Circuit "is among the minority that has limited § 1 to the transportation industries and therefore applies the Arbitration Act to most collective bargaining agreements." *Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Indus. Workers of Am.*, 36 F.3d 712, 715 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1998, 131 L.Ed.2d 1000 (1995); *accord Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n. 3 (7th Cir.1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 912, 83 L.Ed.2d 926 (1985); *Pietro Scalzitti Co. v. International Union of Operating Eng'rs, Local No. 150*, 351 F.2d 576, 579-80 (7th Cir.1965); *see also American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 473 (11th Cir.1987). It has not been suggested that Pryner is employed in the transportation industry. However, even assuming that the provisions of the FAA apply to the instant case, sufficient reason does not exist to depart from the clear dictates of *Gardner-Denver*.

The court notes that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24, 111 S.Ct. at 1651 (citations omitted). *But see Farrand v. Lutheran Bhd.*, 993 F.2d 1253,

1255 (7th Cir.1993) ("*Gilmer* did not establish a grand presumption in favor of arbitration; it interpreted and enforced the texts on which the parties had agreed."). Nevertheless, the reasons cited by the Court for its decision in *Gardner-Denver* remain, regardless of the Court's renewed acceptance of arbitration clauses as stated in *Gilmer*. The Court's recognition of the dualism between the contractual rights governed by a collective-bargaining agreement and the statutory rights which flow to each individual within the collective bargaining unit is unchanged. Likewise, the Court's concern regarding the motivations of the union as the representative of the individual members of the bargaining unit when it comes to the enforcement of individual statutory rights also remains. Accordingly, although the instant case may be governed by the FAA, this court remains bound by the decision in *Gardner-Denver*, a decision which dictates that the existence of a possible remedy to Pryner under the CBA does not foreclose Pryner's right to pursue the statutory claims brought in the present litigation. This result is in accord with a number of other courts which have addressed this issue after the *Gilmer* decision. *See, e.g., EEOC v. Board of Governors of State Colleges and Univs.*, 957 F.2d 424, 431 & n. 11 (7th Cir) (citing *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1656-57) ("[I]t is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining."), *cert. denied*, 506 U.S. 906, 113 S.Ct. 299, 121 L.Ed.2d 223 (1992); *DiPuccio v. United Parcel Serv.*, 890 F.Supp. 688, 692-93 (N.D.Ohio 1995); *Randolph v. Cooper Indus.*, 879 F.Supp. 518, 520-23 (W.D.Pa.1994); *Block v. Art Iron, Inc.*, 866 F.Supp. 380, 383-87 (N.D.Ind.1994); *Griffith v. Keystone Steel & Wire Co.*,

858 F.Supp. 802, 804 (C.D.Ill.1994); *Claps v. Moliterno Stone Sales, Inc.*, 819 F.Supp. 141, 144-47 (D.Conn.1993); *see also Austin* 78 F.3d at 886-87 (Hall, J., dissenting). *But see Austin*, 78 F.3d at 877-86, *aff'g*, 844 F.Supp. 1103 (W.D.Va.1994); *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F.Supp. 1529, 1536-40 (N.D.W.Va.1995).

IV. Conclusion

For the reasons stated above, the court finds that neither Pryner's prior arbitration under his CBA of the claims he now brings before the court nor his failure to previously arbitrate said claims has any bearing upon his right to enforce the statutory rights he now asserts. Accordingly, the Defendant's motion for summary judgment on this issue will be **DENIED**. Likewise, the Defendant's motion in the alternative to stay the instant proceedings pending the arbitration of Pryner's claims under the CBA will also be **DENIED**.

ALL OF WHICH IS ORDERED.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 16 of the FAA, 9 U.S.C. § 16, provides as follows (materials in brackets added):

> (a) An appeal may be taken from –
>
> (1) an order –

(A) refusing a stay of any action under section 3 of this title [9 U.S.C. § 3],

(B) denying a petition under section 4 of this title [9 U.S.C. § 4] to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28 [28 U.S.C. § 1292(b)], an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title [9 U.S.C. § 3];

(2) directing arbitration to proceed under section 4 of this title [9 U.S.C. § 4];

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081 (1991), provides as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Section 12212 of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12212, provides as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. MOTLEY, Plaintiff/Counter-claim-defendant, v. TRACTOR SUPPLY COMPANY, Defendant/Counter-claim-plaintiff.	Case No. IP95-0308-C-M/S Judge: Hon. Larry J. McKinney Magistrate: Hon. V. Sue Shields

ORDER

This matter comes before the Court upon Defendant/Counterclaim-plaintiff's TRACTOR SUPPLY COMPANY, INC.'S, Motion For Clarification Of The Court's October 21 and 22, 1996 and January 2, 1997 Orders, Or, In The Alternative For An Extension.

The Court finds that said motion has been brought for good cause and should be granted as follows:

1. Defendant/Counterclaim-plaintiff shall have thirty (30) days from the date of either the date of the United States Supreme Court's order denying certiorari, or the date of the Supreme Court's ultimate determination of the appeal of *Pryner v. Tractor Supply Company* to submit its responsive brief to Plaintiff's supplemental brief; this case shall be stayed until such time.

IT IS SO ORDERED this 21st day of April, 1997.

/s/ Larry J. McKinney
Larry J. McKinney, Judge
United States District Court
Southern District of Indiana

Copies To:

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330 East Kilbourn Avenue
Suite 1475
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Kenneth Collier-Magar, Esq.
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1460 Market Square Center
151 North Delaware Street
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES A. MOTLEY,	)	
	)	
Plaintiff,	)	CAUSE NO. IP 95-0308-
V.	)	C-M/S
	)	
TRACTOR SUPPLY COMPANY,	)	
	)	
Defendant.	)	

ORDER

The Court, having reviewed defendant's motions, now **GRANTS** DEFENDANT'S MOTION FOR LEAVE TO FILE A RESPONSIVE BRIEF THIRTY (30) DAYS AFTER THE FINAL DETERMINATION OF THE APPEAL IN *PRYNER V. TRACTOR SUPPLY CO.*

IT IS SO ORDERED this 2nd day of January, 1997.

/s/ Larry J. McKinney
LARRY J. McKINNEY,
JUDGE
United States District Court
Southern District of Indiana

Distribution to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

STANISLAW NOGA, Plaintiff, -vs- KIMCO CORPORATION, an Illinois corporation, Defendant.	)	96 C 6108 Judge Conlon

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS PENDING ARBITRATION

NOW COMES THE DEFENDANT, KIMCO CORPORATION, by and through its attorneys, Schiff & Hulbert, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for its Motion for Summary Judgment, or, in the Alternative, to Stay Proceedings Pending Arbitration, states as follows:

1. This case was originally filed on September 20, 1996. By minute order of November 6, 1996, this case was dismissed for want of prosecution. This case was reinstated on or about November 27, 1996.

2. Plaintiff alleges he was discriminated against by Defendant Kimco Corporation ("Kimco") because of his age.

3. Defendant filed its Answer and Affirmative Defenses to Plaintiff's Complaint on December 19, 1996.

4. The deposition of Plaintiff was taken on March 14 and March 31, 1997.

5. Plaintiff admitted in his deposition that, as early as September 1993, he was "totally sure" that he was discriminated against because of his age. (Plaintiff's Deposition, p. 44)

6. Any and all conduct prior to February 16, 1994 (300 days prior to the filing of Plaintiff's charge of discrimination at the Equal Employment Opportunity Commission) is not actionable and would be inadmissible at trial.

7. Plaintiff cannot set forth a prima facie case of age discrimination.

8. Plaintiff was terminated for poor performance, a legitimate, non-discriminatory reason.

9. Plaintiff cannot prove that the reason for his termination was pretext.

10. Plaintiff has not been employed since he was terminated by Kimco. Plaintiff has not used reasonable diligence to conduct a job search. Therefore, Plaintiff breached his duty to mitigate his damages. Even if liability were established, Plaintiff would recover nothing.

11. Plaintiff's claim of age discrimination is covered by a mandatory grievance-arbitration procedure. Therefore, the proceedings in this case should be stayed pending the outcome of arbitration.

12. There is no genuine issue of material fact precluding summary judgment in this case.

WHEREFORE, Kimco respectfully requests that this Court grant its Motion for Summary Judgment and enter judgment in its favor as a matter of law as to Plaintiff's Complaint in its entirety. In the alternative, Kimco requests that the proceedings in this case be stayed pending arbitration.

Respectfully submitted,

/s/ Illegible
Attorney for Defendant,
KIMCO CORPORATION

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

STANISLAW NOGA, Plaintiff, -vs- KIMCO CORPORATION, an Illinois corporation, Defendant.	)	96 C 6108 Judge Conlon

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS PENDING ARBITRATION

NOW COMES THE DEFENDANT, KIMCO CORPORATION, by and through its attorneys, Schiff & Hulbert, and in support of its Motion for Summary Judgment, or in the Alternative, to Stay Proceedings Pending Arbitration, states as follows:

* * *

VI. PLAINTIFF FAILED TO EXHAUST HIS REMEDIES UNDER A MANDATORY GRIEVANCE-ARBITRATION PROVISION

The Collective Bargaining Agreement ("CBA") between Kimco and the Service Employees International Union, Local 25, (the "Union") contains a non-discrimination clause. (See CBA, attached as Ex. 9, Art. XXIII, §3) The CBA also provides a mandatory arbitration procedure "pertaining to any difference or dispute which

may arise under this Agreement." (Ex. 9, Art. XVIII) Plaintiff testified that he filed a grievance after each reprimand. He also filed a grievance over his termination. (Denges Aff. ¶21) Plaintiff testified that, in September 1993, he was "totally sure" that he was discriminated against because of his age. (12M ¶142; Pl. Dep. 44) Plaintiff's discrimination allegations were covered by the CBA's mandatory arbitration procedure. The proper forum for asserting his discrimination claim is arbitration. This case is precluded by the arbitration provision.

The U.S. Supreme Court has made clear that agreements to arbitrate statutory claims, such as ADEA, are enforceable. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In a case of first impression in the U.S. Courts of Appeals, the Court of Appeals for the Fourth Circuit held last year that *Gilmer* applies to discrimination claims by union employees when the arbitration agreement is contained in a CBA. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 432 (1997). *Accord Tomasetti v. Prudential Ins. Co. of America*, 153 L.R.R.M. (BNA) (E.D. Cal. 1996); *Jessie v. Carter Health Care Ctr. Inc.*, 930 F. Supp. 1174 (E.D. Ky. 1996).

The Seventh Circuit's recent decision in *Pryner v. Tractor Supply Co.*, ___ F.3d ___, 1997 WL 125936 (7th Cir. 3/20/97) is contrary to *Austin*. No other circuit has yet to decide this issue. There is presently a stay on the Seventh Circuit's mandate, pending the employer's petition for certiorari to the U.S. Supreme Court. Kimco adopts the position of the employer in *Pryner*. Should this Court decide that summary judgment is inappropriate at this

juncture, this case should be stayed pending a final decision in *Pryner.*

VII. CONCLUSION

Plaintiff is unable to meet his burden for proving a prima facie case of age discrimination. Kimco has presented a legitimate, non-discriminatory reason for Plaintiff's discharge. Plaintiff cannot prove that Kimco's proffered business reason is a pretext for discrimination. Therefore, no genuine issue of material fact remains. Kimco is entitled to summary judgment as a matter of law.

WHEREFORE, Kimco respectfully requests that this Court grant its Motion for Summary Judgment and enter judgment in its favor as a matter of law as to Plaintiff's Complaint in its entirety. In the alternative, Kimco requests this court to stay proceedings pending arbitration or a final decision in *Pryner v. Tractor Supply.*

Respectfully submitted,

/s/ Matthew B. Schiff
Attorney for Defendant,
KIMCO CORPORATION

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Developments in Labor Management Relations [LOGO]

Union Members Summary

Internet address: http://stats.bls.gov:80/newsrels.htm
Technical information: (202) 606-6378 USDL 97-27

For release: 10:00 A.M. EST
Media contact: 606-5902 Friday, January 31, 1997

UNION MEMBERS IN 1996

Union membership as a percent of wage and salary employment continued to decline in 1996, the U.S. Department of Labor's Bureau of Labor Statistics reported today. Union members accounted for 14.5 percent of wage and salary employment in 1996, down from 14.9 percent in 1995. In 1983, the first year for which comparable data are available, union members made up 20.1 percent of wage and salary workers.

In 1996, as wage and salary employment continued to rise, the number who were members of unions totaled 16.3 million, little changed from the prior year. Nearly three-fifths of union members (9.4 million) were in private industry, where they constituted 10.2 percent of wage and salary employment. There were 6.9 million union members in government (federal, state, and local), where they accounted for 37.7 percent of wage and salary employment.

Membership by industry and occupation

Among private industry groups, transportation and public utilities had the highest proportion of workers who were union members (27 percent). Other major groups with membership proportions above the private

industry average were construction (19 percent), manufacturing (17 percent), and mining (14 percent). The remaining private industry groups had unionization rates ranging from 2 to 6 percent. (See table 3.)

Precision production, craft, and repair occupations (including, for example, mechanics, electricians, and other skilled trades workers) and operators, fabricators, and laborers (including machine and vehicle operators, assemblers, cleaners, and helpers) continued to have the highest proportions of union members (23 percent each). In contrast, union membership proportions were about 1 in 10 among technical and administrative support occupations and 1 in 20 among farming, forestry, and fishing workers. (See table 3.)

Demographic characteristics of union members

Union membership was higher among men (17 percent) than women (12 percent) and higher among blacks (19 percent) than either whites (14 percent) or Hispanics (13 percent). Within these major groups, black men continued to have the highest union membership rate (22 percent), while white women had the lowest rate (11 percent). Workers ages 35 to 64 had higher unionization rates than either younger or older workers. Full-time workers were more than twice as likely as part timers to be union members. (See table 1.)

Union representation of non-members

In 1996, 1.9 million wage and salary workers were represented at their work place by a union, although they

were not union members themselves. A little more than half worked in government.

Earnings

Among full-time wage and salary workers, union members had median usual weekly earnings of $615 in 1996, compared with a median of $462 for workers not represented by unions. (See tables 2 and 4.) This difference reflects a variety of influences in addition to coverage by a collective bargaining agreement, including variations in the distribution of union members and nonunion employees by gender, occupation, industry, firm size, or geographic region. (For a discussion of the problem of differentiating between the influence of unionization status and other worker characteristics on employee earnings, see Kay E. Anderson, Philip M. Doyle, and Albert E. Schwenk, "Measuring union-nonunion earnings differences," Monthly Labor Review, June 1990, pp. 26-38.) The disparities in union-nonunion earnings were greater for women than for men and for Hispanics and blacks than for whites.

- **Union Members Technical Note**
- Table 1. Union affiliation of employed wage and salary workers by selected characteristics
- Table 2. Median weekly earnings of full-time wage and salary workers by union affiliation and selected characteristics
- Table 3. Union affiliation of employed wage and salary workers by occupation and industry

- Table 4. Median weekly earnings of full-time wage and salary workers by union affiliation, occupation, and industry
- Text version of entire news release

[LOGO] **Table of Contents**

[LOGO] **Developments in Labor-Management Relations**

Bureau of Labor Statistics
ochinfo@bls.gov
Last modified: Thursday, January 30 1997
URL: http://stats.bls.gov/news.release/union2.nws.htm

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT J. HAMMOND, Plaintiff, v. UNITED AIRLINES, INC., AIR WISCONSIN, INC. and AIR WISCONSIN AIRLINES CORP., Defendant.	)	Case No. 96 C 902C

ANSWER AND DEFENSES

Defendants, UNITED AIRLINES, INC., AIR WISCONSIN, INC. and AIR WISCONSIN AIRLINES CORP., by and through their attorneys, WESSELS & PAUTSCH, P.C., by Charles W. Pautsch, Frank A. Gumina and Joseph E. Gumina, hereby set forth their Answer and Defenses to the Complaint filed herein, denying each and every averment of said Complaint except, and only to the extent, as is hereinafter expressly admitted and/or qualified, stating as follows:

1. The District Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 in that Plaintiff Hammond's claims arise under federal law, namely, the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*

ANSWER: Defendants admit that this Court has jurisdiction pursuant to 28 U.S.C. § 1331 in that Plaintiff alleges claims arising under federal law, namely, the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*;

however Defendants deny that they have either individually or in concert, violated any laws.

2. Venue is proper in the Western District of Wisconsin under 28 U.S.C. § 1391(b) in that Plaintiff Hammond resides in Dane County, Wisconsin, a substantial portion of the acts and omissions alleged in this action occurred in this District and the Defendants may be found in this District.

ANSWER: Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph two (2) of the Complaint; and, therefore, Defendants deny the same.

3. Plaintiff Hammond has exhausted all administrative remedies prerequisite to the filing of this action and has been issued a Notice of Right to Sue by the United States Equal Employment Opportunity Commission.

ANSWER: Defendant admits that Plaintiff has been issued a Notice of Right to Sue by the United States Equal Employment Opportunity Commission, but Defendants deny that Plaintiff has exhausted all administrative prerequisites to the filing of this action as to all Defendants.

4. The Plaintiff, Robert J. Hammond, is an adult resident of the State of Wisconsin and resides at 4319 Vilas Hope Road, Cottage Grove, Wisconsin, 53527.

ANSWER: Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph four (4) of the Complaint; and, therefore, Defendants deny the same.

5. The Defendants, United Airlines, Inc., Air Wisconsin, Inc., and Air Wisconsin Airlines Corp., are related

business corporations, the principal business of which is the providing of air transportation services. United Airlines, Inc. has its general offices at P.O. Box 66100, Chicago, Illinois 60666. Air Wisconsin, Inc. and Air Wisconsin Airlines Corp. have their general offices at W6390 Challenger Drive, Suite 203, Appleton, Wisconsin 54915.

ANSWER: Defendants deny that United Airlines, Inc., Air Wisconsin, Inc. and Air Wisconsin Airlines Corp. are related businesses, but Defendants admit that Defendants' principal business is that of providing air transportation services. Further, Defendants admit the remainder of the allegations contained in paragraph five (5) of the Complaint.

6. At all times material hereto Plaintiff Hammond was employed by Defendants as a pilot for Air Wisconsin, Inc.

ANSWER: Defendants deny.

7. On October 6, 1988, while carrying out the duties of his employment as a pilot, Plaintiff Hammond injured his back, which injury required surgery in August, 1989, July, 1992 and, again in November, 1992.

ANSWER: Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph seven (7) of the Complaint; and, therefore, Defendants deny same.

8. As of August 25, 1993 Plaintiff Hammond's treating physicians determined that he had a 20% permanent partial disability and authorized his return to work with a lifting restriction of 40 pounds and the restriction that

he not remain seated for more than one and a half hours without interruption.

ANSWER: Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph eight (8) of the Complaint; and, therefore, Defendants deny same.

9. As of August 25, 1993, and at all times since then, Plaintiff Hammond has been capable of performing the essential functions of his employment as a pilot for Air Wisconsin, Inc., with minimal accommodation, or the functions of some other employment with the Defendants, with or without accommodation, and he has requested that he be permitted to return to his employment as a pilot or to some other employment consistent with his restrictions.

ANSWER: Defendants deny.

10. At all times since August 25, 1993 the Defendants have failed and refused to permit Plaintiff Hammond to return to his employment as a pilot or any other employment with Defendants, with or without accommodation.

ANSWER: Defendants deny.

11. The Defendants are, and each of them is, an employer subject to the Americans With Disabilities Act.

ANSWER: Defendants deny.

12. Plaintiff Hammond is, and at all times material hereto has been, an employee subject to the protections afforded by the Americans With Disabilities Act.

ANSWER: Defendants deny.

13. The actions of the Defendants set forth at Paragraph ten (10) of this Complaint were done by them because of Plaintiff Hammond's disability or because of what they perceived to be his disability, if one existed, all in violation of the Americans With Disabilities Act.

ANSWER: Defendants deny.

14. As a result of said actions by the Defendants, Plaintiff Hammond has lost wages and other benefits of his employment, suffered emotional distress and humiliation, and otherwise been injured.

ANSWER: Defendants deny.

DEFENSES

1. As and for their first defense, Defendants aver that Plaintiff's claims contained in his Complaint are subject to an enforceable agreement to arbitrate, rather than litigate, said claims and, accordingly, this Court lacks jurisdiction to decide same.

2. As and for their second defense, Defendants aver that, notwithstanding its first defense, Plaintiff failed to exhaust his available contractual remedies prior to bringing this lawsuit.

3. As and for their third defense, Defendants state that any and all decisions made regarding Plaintiff were predicated solely upon nondiscriminatory, legitimate

business reasons having no relation whatsoever to Plaintiff's alleged disability or perceived disability.

4. As and for their fourth defense, Defendants assert, upon information and belief, that Plaintiff has failed to mitigate his damages.

5. As and for their fifth defense, Defendants assert, upon information and belief, that Plaintiff is not an individual with a disability, as that term is defined in the Americans With Disabilities Act (42 U.S.C. § 12102); and, therefore, is afforded no protection under the Americans With Disabilities Act (42 U.S.C. § 12101, *et seq.*).

6. As and for their sixth defense, Defendants assert that at all times they acted in good faith in all particulars with regard to Plaintiff.

7. As and for their seventh defense, Defendants assert, upon information and belief, that Plaintiff is not a "qualified individual with a disability," as that term is defined in the Americans With Disabilities Act (42 U.S.C. § 12111(8)); and, therefore, is afforded no protection under the Americans With Disabilities Act (42 U.S.C. § 12101, *et seq.*).

8. As and for their eighth defense, Defendants assert, upon information and belief, that Plaintiff was not qualified as a pilot because in that employment position he posed a "direct threat," as that term is defined by the Americans With Disabilities Act (42 U.S.C. § 12101, *et seq.*).

9. As and for their ninth defense, and in the alternative, Defendants assert that if Plaintiff was entitled to a "reasonable accommodation," as that term is defined by

the Americans With Disabilities Act (42 U.S.C. § 12111(9)), Defendants assert that any such reasonable accommodation afforded to Plaintiff would impose an undue hardship upon the operation of the Defendants.

10. As and for their tenth defense, Defendant, United Airlines, Inc., asserts that it never employed Plaintiff, accordingly, Defendant United Airlines, Inc. is not an "employer" as that term is defined in the Americans with Disabilities Act (42 U.S.C. § 12101, *et. seq.*), and, therefore, is not liable to Plaintiff under the Americans With Disabilities Act (42 U.S.C. § 12101, *et. seq.*)

11. As and for their eleventh defense, Defendant, United Airlines, Inc., asserts that it was not a joint employer of Plaintiff with Air Wisconsin, Inc. in that, among other things, Defendant United Airlines, Inc. played no role in the control of labor relations of Air Wisconsin, Inc., and made no decisions regarding employment matters related to Plaintiff.

12. As and for their twelfth defense, Defendant, Air Wisconsin Airlines Corp., asserts that it never employed Plaintiff accordingly, Defendant Air Wisconsin Airlines Corp., is not an "employer" as that term is defined in the American with Disabilities Act (42 U.S.C. § 12101, *et. seq.*), and, therefore, is not liable to Plaintiff under the Americans with Disabilities Act (42 U.S.C. § 12101, *et. seq.*).

As and for their thirteenth defense, Defendant, Air Wisconsin Airlines, Corp., asserts that it was not a joint employer of Plaintiff with Air Wisconsin, Inc.

Dated this 23rd day of December, 1996.

UNITED AIRLINES, INC., AIR WISCONSIN, INC. and AIR WISCONSIN AIRLINES CORP.

By: /s/ Joseph E. Gumina
Joseph E. Gumina
One of its Attorneys

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